Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	)	
	)	CC Docket No. 94-129
Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers	)	

SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioners Ness and Tristani issuing statements; Commissioner Powell concurring in part, dissenting in part and issuing a statement and Commissioner Furchtgott-Roth dissenting and issuing a statement

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I. INTRODUCTION

1. In this Second Report and Order and Second Further Notice of Proposed Rulemaking (*Order*), we adopt rules proposed in the First Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration (*Further Notice and Order*)[1] to implement section 258 of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996 (1996 Act).[2] Section 258 makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[3] The goal of section 258 and this *Order* is to eliminate the practice of "slamming." A subscriber may authorize a change of his or her long distance carrier, or other telecommunications carrier, by requesting the change directly from his or her local exchange carrier (LEC), or by authorizing the new carrier to request a change on his or her behalf. Slamming occurs when a company changes a subscriber's carrier selection without that subscriber's knowledge or explicit authorization. Slamming nullifies the ability of consumers to select the telecommunications providers of their choice. Slamming also distorts the telecommunications market because it rewards those companies who engage in deceptive and fraudulent practices by unfairly increasing their

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[1] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10,674 (1997) (*Further Notice and Order*).

[2] 47 U.S.C. § 258. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The principal goal of the Act is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) (Joint Explanatory Statement).

[3] 47 U.S.C. § 258(a).

customer base at the expense of those companies that market in a fair and informative manner and do not use fraudulent practices.

2. The numerous complaints we continue to receive and the input of the state commissions and the state attorneys general provide ample evidence that slamming is an extremely pervasive problem.[4] Indeed, slamming is so rampant that it garnered significant attention in Congress in 1998 during the post-legislative session, although ultimately no legislation was passed.[5] Despite the Commission's existing slamming rules, our records indicate that slamming has increased at an alarming rate. In 1997, the Commission processed approximately 20,500 slamming complaints and inquiries, which is an increase of approximately 61% over 1996 and an increase of approximately 135% over 1995.[6] From January to the beginning of December 1998, the Commission processed 19,769 slamming complaints.[7] Furthermore, the number of slamming complaints filed with the Commission is a mere fraction of the actual number of slamming incidents that occur.[8]

3. The Commission recently has increased its enforcement actions to impose severe financial penalties on slamming carriers. Since April 1994, the Commission has imposed final forfeitures totaling $5,961,500 against five companies, entered into consent decrees with eleven companies with combined payments of $2,460,000, and has proposed $8,120,000 in penalties against six carriers.[9] Additionally, the Commission may sanction a

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[4] *See, e.g.*, National Association of Attorneys General (NAAG) Comments at Appendix (containing sampling of consumer complaints); Florida Commission Comments at 1 (stating that it received 2,393 slamming complaints in 1996 and that slamming is the number one telecommunications complaint received by the Florida Commission); NCL Comments at 3 (stating that in 1997, slamming ranked as the sixth most frequent subject of complaint to the National Fraud Information Center, a hotline for reporting fraud). A list of the commenters and their identifying abbreviations is in Appendix C.

[5] William E. Kennard, Chairman of the FCC, received letters from Congress urging the Commission to implement anti-slamming rules and acknowledging that Congress did not pass slamming legislation. *See* Letter from Senator John McCain to William E. Kennard, Chairman, FCC (Oct. 30, 1998); Letter from Congressman Tom Bliley, *et al.* to William E. Kennard, Chairman, FCC (Dec. 11, 1998).

[6] Consumer Complaints and Inquiries, Consumer Protection Branch, Enforcement Division, Common Carrier Bureau, Federal Communications Commission (Oct. 31, 1998).

[7] *Id.*

[8] For example, AT&T estimates that 500,000 of its customers were slammed in 1997. Mike Mills, *AT&T Unveils Plan to Cut "Slamming,"* Wash. Post, Mar. 4, 1998, at C1.

[9] Slamming Enforcement Actions, Enforcement Division, Common Carrier Bureau, Federal Communications Commission (Dec. 17, 1998).

carrier by revoking its operating authority under section 214 of the Act.[10] The Commission recently has resorted to such sanctions against carriers for repeated slamming and other egregious violations of the Act and our rules.[11]

4. The new rules we adopt in this *Order* are not merely intended to conform our existing rules with the provisions of section 258, but also operate to establish a new comprehensive framework to combat aggressively and deter slamming in the future.[12] With our new rules, we seek to close loopholes used by carriers to slam consumers and to bolster certain aspects of the rules to increase their deterrent effect. At the heart of the new slamming rules is our determination to take the profit out of slamming. Our new rules absolve subscribers of liability for some slamming charges in order to ensure that carriers do not profit from slamming activities, as well as to compensate subscribers for the confusion and inconvenience they experience as a result of being slammed. As an additional deterrent, we strengthen our verification procedures and broaden the scope of our slamming rules.

5. Our new rules strengthen the rights of consumers in three areas: (1) the relief given to slamming victims; (2) the method by which a carrier must obtain customer verification of preferred carrier change requests; and (3) the method by which a consumer can "freeze" his or her existing carrier, thus prohibiting another carrier from claiming that it has been authorized to request a carrier change on behalf of the consumer. More specifically, with respect to compensation, under our new rules a subscriber will be absolved of liability for all calls made within 30 days after being slammed.[13] If however, the subscriber fails to notice that he or she has been slammed and pays the unauthorized carrier for such calls, section 258(b) of the Act requires the unauthorized carrier to remit such payments to the authorized carrier.[14] Upon receipt of this amount, the authorized carrier shall provide the

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[10] *See* 47 U.S.C. § 214; *see also CCN, Inc. et al.*, Order, 12 Comm. Reg. (P & F) 104 (1998) (revoking the operating authority of the Fletcher Companies because they slammed long distance telephone subscribers and committed other violations of the Communications Act of 1934, as amended) (*Fletcher Order*).

[11] *Fletcher Order*, 12 Comm. Reg. (P & F) at 104.

[12] In light of this new framework, and the addition of new rules, we have redesignated and renumbered the existing verification rules such that the current section 64.1100 is redesignated as 64.1150, and the current section 64.1150 is redesignated as 64.1160. *See* Appendix A. *See also* 47 C.F.R. §1.412(c) (stating that rule changes may be adopted without prior notice if the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest).

[13] *See infra* discussion on Liability of the Slammed Subscriber. This modifies our current rule under which a slammed consumer is liable for the amount he or she would have paid the authorized carrier for absent the unauthorized change. *See Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, 10 FCC Rcd 9560, 9579 (1995) (*1995 Report and Order*).

[14] *See infra* discussion on Investigation and Reimbursement Procedures.

subscriber with a refund or credit of any amounts the subscriber paid in excess of the authorized carrier's rates.[15] The unauthorized carrier must also pay the authorized carrier for any expenses incurred by the authorized carrier in restoring the subscriber's service or in collecting charges from the unauthorized carrier.[16] These liability rules will not take effect for 90 days, however to enable interested carriers to develop and implement an alternative independent entity to administer compliance with these rules on their behalf.[17] If carriers successfully implement such a plan, we will entertain carriers' requests for waiver of the administrative requirements of our liability rules.[18]

6. This *Order* also modifies the methods by which a carrier can fulfill its obligation to obtain consumer verification of carrier change requests. In particular, we eliminate the "welcome package"[19] as a verification option because we find that it has been subject to abuse by carriers engaged in slamming.[20] Also in connection with verification, we (1) extend our verification rules to apply to carrier change[21] requests made during consumer-

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[15] *See infra* discussion on Subscriber Refunds or Credits.

[16] *See infra* discussion on Investigation and Reimbursement Procedures.

[17] *See infra* discussion on Third Party Administrator for Dispute Resolution.

[18] The following rule provisions in Appendix A impose administrative requirements on the authorized carrier: section 64.1100(c), (d); section 64.1170; section 64.1180. Upon being granted an above-mentioned waiver, the authorized carrier would be permitted to discharge its obligations under these rules by having the neutral third party perform the administrative functions in these rules. *See infra* discussion on Third Party Administrator for Dispute Resolution.

[19] The welcome package is an information package mailed to a consumer after the consumer has agreed to change carriers. It includes a prepaid postcard, which the customer can use to deny, cancel, or confirm the change order.

[20] *See infra* discussion on The Welcome Package.

[21] In the *Further Notice and Order*, we stated that we would use the term "preferred carrier" or "PC" to describe the subscriber's properly authorized or primary carrier(s) (a subscriber may have multiple preferred carriers - one for local exchange service and one for long distance service), as contemplated by the Act. We will use the term "carrier change," however, instead of "PC change," to further distinguish a change in telecommunications carrier from the former term "PIC change," which referred only to a change in a subscriber's primary interexchange carrier. Furthermore, for consistency, we amend the text of the rules to use the term "preferred" in place of the term "primary." *See* Appendix A, §§ 64.1100, 64.1150. *Cf.* 47 C.F.R. § 1.412(c) (stating that rule changes may be adopted without prior notice if the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest). We note that, where appropriate, we will continue to use the term "PIC" in the text of this *Order* to describe a subscriber's primary interexchange carrier prior to the 1996 Act.

initiated (in-bound) calls to carriers,[22] rather than being applicable solely to outbound calls made by carriers to consumers; (2) extend our verification rules to apply, with a limited exception, to all telecommunications carriers in connection with changes of all telecommunications service, including local exchange service;[23] and (3) clarify that all carrier changes must be verified in accordance with one of the options provided in our rules, regardless of the manner of solicitation.[24] Finally, we set forth rules governing the preferred carrier freeze process, including verification requirements for imposing a freeze and mandating certain methods for lifting a freeze.[25]

7. This *Order* also contains a Further Notice of Proposed Rulemaking, in which we propose several additional changes to further strengthen our slamming rules and otherwise prevent slamming. In particular, we seek comment on: (1) requiring unauthorized carriers to remit to authorized carriers certain amounts in addition to the amount paid by slammed subscribers; (2) requiring resellers to obtain their own carrier identification codes (CICs) to prevent confusion between resellers and their underlying facilities-based carriers; (3) modifying the independent third party verification method[26] to ensure that it will be effective in preventing slamming; (4) clarifying the verification requirements for carrier changes made using the Internet; (5) defining the term "subscriber" to determine which person or persons should be authorized to make changes in the selection of a carrier for a particular account; (6) requiring carriers to submit to the Commission reports on the number of slamming complaints received by such carriers to alert the Commission as soon as possible about carriers that practice slamming; (7) imposing a registration requirement to ensure that only qualified entities enter the telecommunications market; (8) implementing a third party administrator for

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[22] *See infra* discussion on Application of the Verification Rules to In-Bound Calls. In 1995, we concluded that the Commission's verification rules should apply to in-bound calls. *See 1995 Report and Order*, 10 FCC Rcd 9560 (1995). The Commission, on its own motion, stayed its *1995 Report and Order* insofar as it extends the primary interexchange carrier change (PIC-change) verification requirements set forth in section 64.1100 of the Commission's rules to consumer-initiated calls. *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Order, 11 FCC Rcd 856 (1995) (*In-bound Stay Order*).

[23] *See infra* discussion on Application of the Verification Rules to the Local Market and discussion on Application of the Verification Rules to All Telecommunications Carriers. At this time, however, we exclude commercial mobile radio services (CMRS) carriers from compliance with our verification requirements. *See infra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

[24] *See* Appendix A, §§ 64.1150, 64.1160.

[25] A preferred carrier freeze prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent. *See infra* discussion on Preferred Carrier Freezes.

[26] *See* 47 C.F.R. § 64.1100(c).

execution of preferred carrier changes and preferred carrier freezes.

8. We emphasize that the way to attack the slamming problem is to combat it on several fronts: improving the verification rules, imposing forfeitures and creating other financial disincentives for unscrupulous carriers, and increasing consumer awareness. In addition to prescribing rules to eliminate slamming, the Commission will continue to mete out swift, meaningful punishment for carriers that slam subscribers. Furthermore, the Commission will continue to work with the states to alert consumers about slamming and other telecommunications trends that may affect them, so that consumers can protect themselves from these practices.[27]

II. BACKGROUND

9. The Commission first established safeguards to deter slamming when it implemented equal access requirements in 1985. Equal access, which facilitated the entry of multiple competitors into the long distance service market following the divestiture of American Telephone & Telegraph Company (AT&T), allows subscribers to access the facilities of a designated IXC by dialing "1" only, rather than having to dial a multi-digit access code for some IXCs.[28] At the time of the divestiture of AT&T, IXCs began to compete for presubscription agreements with potential customers.[29] Slamming did not occur prior to the advent of competition in the long distance telephone marketplace because consumers did not have any choices in long distance service. We note that slamming does not include instances where a subscriber is dropped from a carrier's service, for reasons such as nonpayment of service, and ends up not being presubscribed to any carrier. Even though this may be a "change" in a subscriber's carrier, the subscriber has not been changed to a new carrier and therefore has not been slammed.

10. The Commission's original approach required IXCs to obtain written letters of

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[27] The Commission started its consumer outreach program in 1995, with the publication of the Common Carrier Scorecard. Furthermore, the Commission's Call Center staff, at 1-888-CALL-FCC, is trained to answer consumer inquiries on slamming.

[28] *See Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, 101 FCC 2d 911 (1985) (*Allocation Order*); *recon. denied*, 102 FCC 2d 503 (1985) (*Allocation and Waiver Recon Order*); *Investigation of Access and Divestiture Related Tariffs, Allocation Plan Waivers and Tariffs*, Memorandum Opinion and Order, 101 FCC 2d 935 (1985) (*Waiver Order*). Equal access for IXCs is that which is equal in type, quality, and price to the access to local exchange facilities provided to AT&T and its affiliates. *United States v. American Tel. & Tel.*, 552 F.Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983), *vacated, United States v. Western Elec. Co.*, 2 Comm. Reg. (P & F) 1388 (D.D.C. 1996) (*Modification of Final Judgment* or *MFJ*).

[29] Presubscription is the process that enables each subscriber to select one primary IXC, from among several available carriers, for the subscriber's phone line(s). *Allocation Order*, 101 FCC 2d at 928.

agency (LOAs)[30] authorizing the IXC to request on behalf of a subscriber, a change in the subscriber's preferred interexchange carrier.[31] Because some carriers continued to engage in slamming, however, the Commission in 1992 adopted procedures for verification of telemarketing sales of long distance services.[32] In 1995, the Commission, on its own motion and in response to continuing complaints from consumers regarding slamming by IXCs, adopted rules establishing further anti-slamming safeguards to deter the use of misleading LOAs.[33] The *1995 Report and Order* specifically prohibited the potentially deceptive and confusing practice of combining LOAs with promotional materials, such as sweepstakes entry forms, in the same document.[34] The *1995 Report and Order* also prescribed the minimum content of LOAs, required that the LOA be written in clear and unambiguous language, prohibited "negative option" LOAs,[35] and required that LOAs contain complete translations if they employ more than one language.[36] In the *Further Notice and Order*, the Commission clarified that carriers using LOAs must fully translate their LOAs into the same language(s) as their associated promotional materials or oral descriptions and instructions.[37]

11. The Commission's current slamming rules, which apply only to long distance carriers, require such carriers to first obtain authorization from subscribers for preferred carrier changes and then to verify that authorization.[38] The current rules also require IXCs to verify all PIC changes using either a written LOA[39] or, if the carrier has used telemarketing to solicit the customer, one of the following four procedures: (1) obtain an LOA from the subscriber; (2) receive confirmation from the subscriber via a call from the subscriber to a toll-free number provided exclusively for the purpose of confirming change orders

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30 *See* 47 C.F.R. § 64.1150.

31 *See Allocation Order*, 101 FCC 2d at 929; *Waiver Order*, 101 FCC 2d at 942.

32 *See generally Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order*, 7 FCC Rcd 1038 (1992) (*PIC Verification Order*), *recon. denied*, 8 FCC Rcd 3215 (1993) (*PIC Verification Reconsideration Order*).

33 *See generally 1995 Report and Order.*

34 *1995 Report and Order*, 10 FCC Rcd at 9561.

35 "Negative option" LOAs require consumers to take some action to avoid having their telecommunications carrier switched.

36 *1995 Report and Order*, 10 FCC Rcd at 9561.

37 *Further Notice and Order*, 12 FCC Rcd at 10677.

38 *See* 47 C.F.R. §§ 64.1100, 64.1150.

39 47 C.F.R. § 64.1150.

electronically;[40] (3) use an independent third party to verify the subscriber's order; or (4) send an information package, also known as the "welcome package," that includes a postage-paid postcard which the subscriber can use to deny, cancel, or confirm a service order, and wait 14 days after mailing the packet before submitting the PIC change order.[41] A carrier that makes unauthorized changes to a subscriber's selection of telecommunications provider and charges rates higher than that of the authorized carrier must re-rate that subscriber's bill to ensure that the subscriber pays no more than what he or she would have paid the authorized carrier.[42] The unauthorized carrier must also pay for any carrier-change charges assessed by the LEC.[43]

12. As part of the 1996 Act, Congress for the first time established a specific statutory prohibition against "slamming." Section 258(a) of the Act makes it unlawful for any telecommunications carrier[44] to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[45] The section further provides:

> Any telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation.[46]

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[40] We note that this method of verification may not be used to obtain the initial authorization for a carrier change because the toll-free number must be provided exclusively for the purpose of verifying previously-obtained change orders.

[41] 47 C.F.R. § 64.1100.

[42] *1995 Report and Order*, 10 FCC Rcd at 9579.

[43] *Illinois Citizens Utility Board Petition for Rulemaking*, 2 FCC Rcd 1726, 1729 (1987) (*Illinois CUB Order*).

[44] The Act defines "telecommunications carrier" in pertinent part as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. § 153(44). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[45] 47 U.S.C. § 258(a).

[46] 47 U.S.C. § 258(b).

The enactment of section 258 by the 1996 Act necessitates that we reexamine our existing slamming rules to ensure that they conform with Congress' directives. The 1996 Act is intended, *inter alia*, to encourage competition in the provision of local exchange services and further enhance competition in the long distance market. In the environment created by the 1996 Act, LECs, IXCs, and other carriers will compete with each other to provide local exchange, intraLATA toll, interLATA toll, intrastate, and interstate services.[47] Furthermore, because LECs will be competing with other carriers for consumers' local and long distance services, LECs may not be neutral third parties in implementing carrier changes. Because the anti-slamming provisions of section 258 apply to all telecommunications carriers, we must assess whether existing safeguards against slamming are adequate in a marketplace in which carriers can compete for local as well as long distance service customers, and where there may no longer be a disinterested party executing changes in subscribers' telecommunications carriers.

III. DISCUSSION

13. Until now, our efforts to deter slamming have concentrated on enhancing the verification of carrier changes and on issuing monetary forfeitures against carriers who violate our verification rules. Despite the safeguards established by our existing rules, however, the problem of slamming has continued to grow. While some unauthorized changes may be inadvertent,[48] and while it is too early to measure the impact of our recently heightened prosecution of slamming carriers, our experience in this area leads us to the inescapable conclusion that slamming has become a profitable business for many carriers. For this reason, the rules we adopt in this *Order* not only seek to strengthen the existing verification rules, but

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[47] In the *Further Notice and Order*, we modified section 64.1150(e)(4) to use the terms "interstate/intrastate" and "interLATA/intraLATA" in order to adopt rules that would be generally relevant to all jurisdictions. *Further Notice and Order*, 12 FCC Rcd at 10,705. For convenience, throughout this *Order* we will use generally the terms "interLATA/intraLATA" except where "interstate/intrastate" would be more appropriate (*e.g.*, in discussion of federal and state jurisdiction issues). We will use generally the term "intraLATA" to refer to intraLATA interexchange, and "local exchange" will refer to intraLATA exchange. We note that a LATA (Local Access and Transport Area) is defined in Section 3(25) of the Act as a contiguous geographic area:

> (A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, of State, except as expressly permitted under the AT&T Consent Decree; or
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> (B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

47 U.S.C. § 153(25).

[48] *See, e.g.*, ACTA Comments at 4; Sprint Comments at 3.

are more broadly designed to prevent carriers from making any profits when they slam consumers.

14. An essential element of this effort is the adoption of rules absolving consumers of liability to slamming carriers for charges incurred for a limited period of time after an unauthorized change. Where a subscriber does pay the slamming carrier, section 258 requires the slamming carrier to pay the charges it collects from the slammed subscriber to the properly authorized carrier.[49] Hence, carriers that violate our verification procedures will either be deprived of, or be required to forfeit, revenues they heretofore have been able to keep.[50] We have seen many cases where unscrupulous carriers have generated huge profits through slamming, only to disappear or declare bankruptcy when finally caught. One way to deter this behavior is to ensure that these carriers never receive any money from slammed consumers in the first instance. Moreover, even where carriers have not engaged in an intentional pattern of slamming, the strongest incentive for such carriers to implement strictly our verification rules is to know that failure to comply may mean that they will not get paid for any services rendered after an unauthorized switch.

15. Our new rules confront the problem of slamming in three ways by (1) adopting liability provisions that take the economic incentive out of slamming; (2) adopting more stringent verification requirements; and (3) broadening the scope of our rules. We conclude that this rigorous approach will combat effectively the slamming problem in the long distance telecommunications market, as well as prevent slamming occurrences as competition develops in the local exchange and intraLATA toll markets. The majority of commenters support our approach as outlined in the *Further Notice and Order.* Some commenters contend that we should not adopt additional slamming rules without further analysis of the causes of slamming.[51] Our experience with consumer slamming complaints, however, as well as the very thorough record that has been compiled in this docket, have supplied us with abundant evidence concerning the problem and causes of slamming to adopt the rules contained herein.

16. We emphasize that the rules we adopt strike a balance between our goals of protecting consumers and of promoting competition. Rules that make it more difficult for carriers to slam consumers may also make it more difficult for carriers to gain new

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[49] 47 U.S.C. § 258(b).

[50] Prior to the passage of section 258, a carrier that slammed a consumer was permitted to collect from the consumer the amount that the consumer's properly authorized carrier would have charged. *See 1995 Report and Order*, 10 FCC Rcd at 9579.

[51] *See, e.g.*, Sprint Comments at 25; U S WEST Reply Comments at 4. ACTA, Sprint, and Frontier contend, for example, that an alleged slam may occur for a number of reasons, ranging from the error of an incumbent local exchange carrier (ILEC) to a consumer's change of heart, and that the problem of slamming has been exaggerated by the media. ACTA Comments at 4; Frontier Comments at 4; Sprint Comments at 3.

subscribers in a legitimate manner. Nonetheless, our ultimate concern in this proceeding is protecting consumers and consumer choice. We can not allow this fraudulent practice to grow unabated as it has in recent years. Moreover, for healthy competition to flourish, consumer choice must be protected vigorously. Thus, the slamming rules we adopt herein operate to foster meaningful competition that is not at the expense of important consumer protection.

A. Section 258(b) Liability

1. Liability of the Slammed Subscriber

a. Background

17. In the *Further Notice and Order*, the Commission stated that section 258(b) of the Act makes it clear that any unauthorized carrier is not entitled to keep any revenue gained through slamming.[52] The Commission noted, however, that the Act did not address whether subscribers must pay any unpaid charges assessed by an unauthorized carrier to the properly authorized carrier, or whether charges collected from the unauthorized carrier should be returned to the subscriber who has been slammed.[53] In the *1995 Report and Order*, the Commission supported the policy of allowing unauthorized IXCs to collect from the consumer the amount of charges the consumer would have paid if the preferred carrier had never been changed.[54] The National Association of Attorneys General (NAAG), in its petition for reconsideration of the *1995 Report and Order*, urged the Commission to consider absolving slammed consumers of all liability for charges assessed by unauthorized IXCs.[55] In the subsequent *Further Notice and Order*, the Commission concluded that it did not have sufficient information to determine whether total forgiveness of charges would further deter IXCs from slamming and sought further comment on the issue.[56]

b. Discussion

18. Our experience with slamming and the failure of our existing rules to stem the growth of this fraudulent practice convince us that strong prophylactic measures are necessary to ensure that consumers' choices of telecommunications service providers are respected. We

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[52] *Further Notice and Order*, 12 FCC Rcd at 10689; *see also* 47 U.S.C. § 258(b).

[53] *Further Notice and Order*, 12 FCC Rcd at 10689.

[54] *See 1995 Report and Order*, 10 FCC Rcd at 9579 (concluding that "the slammed consumer does receive a service, even though the service is being provided by an unauthorized entity").

[55] NAAG Petition for Reconsideration at 5.

[56] *Further Notice and Order*, 12 FCC Rcd at 10690, 10706.

therefore conclude that subscribers should not have to pay for slamming charges, a change that should prevent carriers from gaining any revenues from slamming activities. Moreover, consumers deserve some compensation for the inconvenience and confusion they experience from being slammed. Therefore we adopt a rule absolving consumers of liability for unpaid charges assessed by unauthorized carriers for 30 days after an unauthorized carrier change has occurred.[57] Any carrier that the subscriber calls to report the unauthorized change, whether that entity is the subscriber's LEC, unauthorized carrier, or authorized carrier, is required to inform the subscriber that he or she is not required to pay for any slamming charges incurred for the first 30 days after the unauthorized change.[58] If a subscriber pays charges to his or her unauthorized carrier, however, such subscriber's liability will be limited to the amount he or she would have paid the authorized carrier.[59] We note that, as explained fully in the discussion on Third Party Administrator for Dispute Resolution, we delay the effective date of the liability rules for 90 days to provide interested carriers an opportunity to implement a dispute resolution mechanism involving an independent administrator.[60]

19. Many state commissions and consumer protection organizations support absolving the consumer of liability for charges incurred after being slammed.[61] We agree with those commenters, such as NCL, NAAG, and the Virginia Commission, that absolving slammed consumers of liability for charges will discourage slamming by taking the profit out of this fraudulent practice. Specifically, our liability rules that provide for limited absolution for slamming charges will deter slamming by minimizing the opportunity for unauthorized carriers to physically take control of slamming profits for any period of time.[62] Even though section 258(b) requires the unauthorized carrier to remit to the authorized carrier all charges collected from the subscriber,[63] this does not mean that the unauthorized carrier will be deprived of revenue, nor that the authorized carrier will receive such money. Several

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[57] *See* Appendix A, § 64.1100(d). In a separate proceeding, we have proposed changes to consumer telephone bills to make it easier for consumers to identify changes in preferred carriers. *Truth-in-Billing and Billing Format,* Notice of Proposed Rulemaking, 13 FCC Rcd. 18176 (1998) *(Truth-in-Billing NPRM).*

[58] *See* Appendix A, § 64.1100(d).

[59] *See infra* discussion on Subscribers Refunds or Credits.

[60] *See infra* discussion on Third Party Administrator for Dispute Resolution.

[61] *See, e.g.*, NAAG Comments at 5; NCL Comments at 9; Virginia Commission Comments at 3-4; Citizens Comments at 2. Montana Commission states that Montana's law absolves subscribers of liability for all charges incurred after slamming. Montana Commission Comments at 2.

[62] *See*, NCL Comments at 9; Montana Commission Comments at 3-4; Virginia Commission Comments at 3-4.

[63] 47 U.S.C. § 258(b).

commenters state that absolution is preferable to using the remedy in section 258(b) because the slamming carrier is likely to refuse to remit revenues to the authorized carrier.[64] In practice, unscrupulous carriers will have many excuses for not remitting any money to authorized carriers, including going bankrupt or simply disappearing.[65] We have seen several carriers go bankrupt during or after our investigations for slamming violations,[66] and have concerns that such carriers will simply reappear in another location, under a different name, and continue to slam consumers. We have also seen carriers change business locations frequently in order to avoid liability for slamming.[67] We find, based on our experience, that unscrupulous carriers will attempt to take such evasive actions to avoid having to pay financial penalties to authorized carriers for slamming.[68] Unscrupulous carriers would therefore be able to continue to profit from slamming if we require the consumer to pay the unauthorized carrier. Eliminating the cash flow to slamming carriers in the first instance prevents slamming carriers from keeping any slamming profits.

20. This rule also makes slamming unprofitable because it provides consumers with incentive to scrutinize their monthly telephone bills early and carefully. By encouraging consumers to police their own telephone bills, this rule enlists the public's help in detecting occurrences of slamming.[69] By providing subscribers with a remedy that is easy to administer, *i.e.*, consumers simply refuse to pay telephone bills containing slamming charges, we provide a quick and simple process to stop slamming. Although requiring consumers to pay charges to their authorized carriers would also prevent slamming carriers from obtaining slamming profits, this would involve a more complicated mechanism. Payment of slamming charges to authorized carriers at the rates of the authorized carriers would require re-rating of bills in every instance of slamming. It also would result in the authorized carrier being paid for services it never provided. Absolution provides consumers with the incentive to help

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[64] *See, e.g.*, Citizens Reply at 4; NYSDPS Comments at 11; PaOCA Comments at 8.

[65] *See, e.g.*, NYSDPS Comments at 11; PaOCA Comments at 8.

[66] The Commission has rescinded Notices of Apparent Liability for slamming violations because the subject carriers have filed for bankruptcy. *See, e.g., Interstate Savings D/B/A ISI Telecommunications*, Notice of Apparent Liability for Forfeiture, 10 FCC Rcd 10877 (1995); *Interstate Savings D/B/A ISI Telecommunications*, Memorandum Opinion and Order, 12 FCC Rcd 2934 (1997).

[67] For example, in April 1998, we assessed forfeitures of $5,681,500 against a carrier for slamming and other violations of the Act and our rules. *Fletcher Order*, 12 Comm. Reg. (P&F) 104 (1998). During the course of our investigation, the Fletcher Companies deliberately eluded Commission staff by moving to different addresses and by failing to provide legitimate business addresses or telephone numbers.

[68] In the accompanying Further Notice of Proposed Rulemaking, we discuss requiring carriers to file a registration with the Commission to enable us to locate and track carriers in the future.

[69] *See Truth-in-Billing NPRM*, 13 FCC Rcd at 18186 (proposing that telephone bills include a section that highlights any changes in a consumer's service status).

themselves with an easily administered remedy. For these reasons, we believe that absolving consumers of liability for slamming charges will be far more effective than requiring them to pay charges to their authorized carriers, as many commenters suggested.[70]

21. We also choose to absolve consumers of liability for a limited time because it provides some compensation to consumers for the time, effort, and frustration they experience as a result of being slammed, as well as for the loss of choice and privacy.[71] We find that consumers suffer a great deal of confusion and outrage upon discovering that they have been slammed. We further find that a consumer often experiences great difficulty and inconvenience in correcting the slamming situation and being restored to his or her rightful carrier. Because slamming inflicts these burdens on consumers, slammed consumers should receive reparation for their troubles.

22. We balance this need to compensate the consumer, however, against the possibility of consumers improperly reporting that they were slammed in order to obtain free telephone service. The likelihood of this type of fraud is the main objection of most carriers to a rule absolving consumers of liability.[72] To address such concerns about fraud, we point out that subscribers may only be absolved of liability if they have in fact been slammed. Carriers can, as described below, produce proof of valid verification to refute a subscriber's claim that he or she was slammed. This approach has the added benefit of strengthening carriers' incentive to comply strictly with our verification procedures in order to protect themselves from inappropriate claims by consumers that they have been slammed. Our rules will motivate carriers that submit legitimate carrier changes not only to verify carrier changes properly, but also to use forms of verification that provide solid evidence that a consumer has authorized and verified a carrier change.[73] Specifically, we set forth in the Investigation and Reimbursement Procedures section of this *Order* the mechanism by which a carrier may refute a subscriber's claim of being slammed.[74]

23. In the *Further Notice and Order*, the Commission asked commenters to consider, if subscribers were to be absolved of liability for unpaid charges, whether it should limit the time during which subscribers would not be liable for charges, and it asked for

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[70] *See, e.g.*, Bell Atlantic Comments at 2; CompTel Comments at 11; USTA Comments at 10.

[71] *See, e.g.*, Montana Commission Comments at 3-4; OCC Reply Comments at 7.

[72] *See, e.g.*, Ameritech Comments at 28; Illinois Commission Comments at 6; TRA Comments at 14.

[73] For example, a carrier may wish to provide an audio tape recording of an independent third party verification.

[74] *See infra* discussion in Investigation and Reimbursement Procedures.

recommendations regarding what that time should be.[75] Commenters state that if consumers are to be absolved of liability for charges incurred after being slammed, it should be for only a limited time.[76] We agree that restricting the period of time for which the consumer is absolved of charges not only limits opportunities for consumers to take possible unfair advantage of carriers, but also provides incentive for consumers to review their bills carefully and promptly. We limit the absolution period to 30 days after an unauthorized change has occurred. Several carriers support a 30-day limit to absolution.[77] To the extent that the subscriber receives additional charges from the slamming carrier after the 30-day absolution period, the subscriber shall pay such charges to the authorized carrier at the authorized carrier's rates after the authorized carrier has re-rated such charges.[78] In most cases, the consumer will discover the unauthorized change upon receipt of the first monthly bill after the unauthorized change occurs, because that bill generally provides the consumer with the first notice that a carrier change has been made.[79] The balanced approach we adopt today encourages consumers to become more vigilant in detecting slamming by giving them incentive to review their telephone bills carefully.

24. The limitation on absolution for the first 30 days after an unauthorized change may be waived by the Commission in circumstances where it is necessary to extend the period of absolution in order to provide a subscriber with a fair and equitable resolution. Waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest.[80] As explained above, we conclude that a 30-day limit is reasonable because subscribers generally discover within one month that an unauthorized change has occurred. The special circumstances that may affect this period of absolution would likely be practices used to delay the subscriber's realization of the carrier change. For example, a waiver of the 30-day limit might be appropriate if the

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[75] *Id.*

[76] *See, e.g.*, Excel Comments at 6-7; NYSCPB Comments at 9; WorldCom Comments at 13.

[77] *See, e.g.*, Citizens Reply at 4; WorldCom Reply at 11; MCI Ex Parte Letter from Mary L. Brown, MCI WorldCom, Inc. to Magalie Roman Salas, FCC (Nov. 17, 1998) (stating that MCI WorldCom supported the provision in recent slamming legislation that would have required carriers to provide up to 30 days of free service to consumers where the carrier could not produce evidence of compliance with the Commission's rules); Telecommunications Resellers Association Ex Parte Presentation at 9 (Dec. 3, 1998) (suggesting a 30-day limit on the extent to which consumers may be relieved from paying for telephone service received from slamming carriers).

[78] *See* Appendix A, § 64.1100(d)(3).

[79] In the *Truth-in-Billing* rulemaking proceeding, we proposed that all telephone bills include a section that highlights all changes to a subscriber's service, including carrier changes. *See Truth-in-Billing NPRM*, 13 FCC Rcd at 18186.

[80] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

subscriber's telephone bill failed to provide reasonable notice to the subscriber of a carrier change, or if the slamming carrier did not have a monthly billing cycle. Another factor that could extend the absolution period would be a situation in which the slamming carrier did not immediately bill the subscriber for calls made, but instead withheld charges for several months and placed all such charges on a later bill, such that the subscriber did not realize that a slam occurred until months after the fact. We note, however, that we expect these instances to be infrequent and will not grant waivers of the 30-day limit unless the request meets all of the criteria for waivers.

25. We recognize that in 1995 the Commission decided that slammed consumers should pay their unauthorized carriers for charges incurred after being slammed at the rate they would have paid if the unauthorized change had never occurred.[81] The Commission based its decision on the fact that the slammed subscriber does receive a service, even though the service is provided by a carrier not of the consumer's choosing.[82] The Commission recognized, however, that this solution "may not be the best deterrent against slamming . . . if 'slamming' continues unabated . . . we may have to revisit this question at a later date."[83] Because slamming continues to be a major consumer problem, we now find that our approach to consumer liability must be revised. We conclude that the most effective deterrent to slamming is to absolve consumers of liability for a limited time. This will deprive slamming carriers of revenue while creating incentives both for consumers to read their telephone bills and for carriers to ensure that carrier changes are made in accordance with our rules.

26. Several carriers argue that slammed consumers should pay all charges because absolving them of liability would give consumers a windfall.[84] We disagree. This argument fails to recognize that consumers who are slammed have suffered both the personal intrusion of having their choices denied, as well as the imposition of having to remedy the unauthorized change. That is, the consumer has been the subject of fraud, or even mistake, on the part of the unauthorized carrier and deserves some compensation for the intrusion, as well as for the time and effort expended in reinstating the preferred carrier.

27. Furthermore, we agree with those commenters that state that a limited absolution rule does not substantially harm the authorized carrier, who has not provided service to the slammed consumer during the period of absolution.[85] In the *Further Notice and*

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[81] *See 1995 Report and Order*, 10 FCC Rcd at 9579.

[82] *Id.*

[83] *Id.*

[84] *See, e.g.*, CWI Comments at 10; SBC Comments at 11. *See also* ACTA Comments at 35; TRA Comments at 14 (stating that authorized carriers should not be deprived of revenue).

[85] *See, e.g.*, Citizens Comments at 4; NCPSUC Comments at 5; NYSCPB Reply at 4; OCC Comments at 4.

Order, the Commission sought comment on the effect of absolving slammed subscribers of liability for unpaid charges, in light of the fact that the authorized carrier might be deprived of foregone revenue.[86] We now conclude that, although the authorized carrier is deprived of profits that it would have received but for the unauthorized change, it also has not actually provided any service to the subscriber and it appears that the authorized carrier is not out of pocket for most costs that it would have borne if it had in fact provided service. This includes not only the cost of transmission, but other costs of providing service, such as access charges and other fees.[87] We emphasize that, should the authorized carrier conclude that it is entitled to any compensation from the slamming carrier that it does not receive under our rules, such as lost profits or other damages, the authorized carrier has recourse against the slamming carrier in the appropriate forum, such as before the Commission or in a state or federal court.[88] We conclude that the approach to liability we adopt herein strikes a reasonable balance between the interests of carriers and consumers. We also note that, in the Further Notice of Proposed Rulemaking section of this *Order*, we propose to permit the authorized carrier to collect from the slamming carrier either: (1) double the amount of charges paid by a slammed subscriber, or (2) the amount for which a subscriber has been absolved of liability.[89] This proposal would provide limited absolution for all consumers -- thus satisfying Congress' policy that "consumers be made whole"[90] -- while at the same time ensuring that authorized carriers are no worse off as a result of an unauthorized change.

28. Several commenters, including AT&T and GTE, state that consumers should pay for services received in order to give effect to the remedy in section 258(b), which requires unauthorized carriers to give authorized carriers all charges collected from slammed subscribers.[91] By its terms, that remedy applies only when the consumer has in fact made payment to the unauthorized carrier. Section 258(b) does not *require* the consumer to pay

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[86] *Id.*

[87] In the Commission's most recent estimates, the combined access charges paid by long distance carriers are approximately four cents per minute. *Trends in Telephone Service*, Federal Communications Commission, July 1998. By comparison, many long distance carriers have been advertising residential *rates* of ten cents per-minute or less.

[88] *See, e.g.*, 47 U.S.C. § 208. The authorized carrier may take many different avenues to make additional claims against the slamming carrier. For example, the authorized carrier could file suit in state court for tortious interference with a business contract. If the slamming carrier is a reseller of the authorized carrier's services, the authorized carrier might also have a claim against the slamming carrier for violation of contract terms.

[89] *See infra* Further Notice of Proposed Rulemaking, Recovery of Additional Amounts from Unauthorized Carriers.

[90] Joint Explanatory Statement at 136.

[91] *See, e.g.*, AT&T Comments at 10; GTE Reply Comments at 6.

either the authorized carrier or the unauthorized carrier.[92] As discussed in the following section, if a subscriber does pay his or her unauthorized carrier, the authorized carrier will be entitled to collect that amount from the unauthorized carrier in accordance with section 258(b). Although we recognize that encouraging subscribers not to pay the slamming carrier may reduce the amounts authorized carriers may collect from slamming carriers pursuant to section 258(b), absolving subscribers of the responsibility to pay their slamming carriers in the first instance does not abrogate the section 258(b) remedy for authorized carriers.

29. We do recognize that by absolving the consumer of liability for a certain period of time, our remedy goes beyond the specific statutory remedy that is explicitly set forth in section 258(b) of the Act. Section 258(b) also states, however, that "the remedies provided by this subsection are in addition to any other remedies available by law."[93] Absolving slammed subscribers of liability for a limited period of time is within the Commission's authority under section 201(b) to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act," as well as under section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[94] Pursuant to such authority, we have determined that the most effective method of deterring slamming is to deprive carriers of revenue from slamming by absolving consumers of liability for 30 days after the unauthorized change. As we have already stated, by enabling the consumer to forgo payment to the slamming carrier, we limit the opportunities for slamming carriers to profit from slamming. Furthermore, the absolution remedy we adopt is not inconsistent with section 258 because the section 258(b) remedy only applies to charges that have been paid to the slamming carrier and does not reference charges that have not been paid.

30. We also recognize that, to the extent that our rules permit authorized carriers to collect some charges, at their rates, for services provided by slamming carriers beyond the 30-day absolution period, these requirements are not in accordance with Section 203(c), which requires carriers to collect charges in accordance with their filed tariffs.[95] Because tariffs only permit carriers to collect charges for service they actually provide, our new rule requiring

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92 47 U.S.C. § 258(b).

93 *Id.*

94 *See* 47 U.S.C. §§ 201(b); 4(i).

95 Section 203(c) states that no carrier shall "(1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule than in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c).

authorized carriers to collect charges for service provided by slamming carriers would not be in accordance with their tariffs. Section 10 of the Act, however, permits the Commission to forbear from applying section 203 tariff requirements to interstate, domestic, interexchange carriers if the Commission determines that three statutory forbearance criteria are satisfied.[96] We conclude that these criteria are met.

31. First, we find that enforcement of section 203(c) in this instance is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that carrier or service are just and reasonable and are not unjustly or unreasonably discriminatory.[97] The circumstances under which we permit the authorized carrier to collect charges that are not in accordance with its tariff are very limited. In fact, by requiring the subscriber to pay the authorized carrier rather than the slamming carrier, our rule helps to deter the unlawful, unjust, and unreasonable practices of slamming carriers by preventing them from making profits from slammed consumers. Under these limited circumstances, our rule is not necessary to ensure that the authorized carrier's charges, practices, classifications, or regulations from being just and reasonable, and not unjustly or unreasonably discriminatory.

32. Second, enforcement of section 203(c) under these circumstances is not necessary for the protection of consumers.[98] On the contrary, requiring subscribers to pay their slamming carriers rather than their authorized carriers would be harmful to consumers. Our rule operates to protect consumers from the abusive practices of slamming carriers by depriving such carriers of slamming profits. Therefore enforcement of section 203(c) in this particular situation is not necessary to protect consumers.

33. Third, forbearance from applying section 203(c) in this instance is consistent with the public interest.[99] In making this determination, section 10(b) also requires us to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[100] We conclude that permitting the subscriber to pay the authorized carrier for charges imposed by slamming carriers after the 30-day absolution period is consistent with the public interest. Slamming distorts competition in the marketplace because it rewards carriers who employ fraud and deceit over carriers that are conducting lawful activities. Slamming also deprives a consumer of choice. Because our rule deters slamming by making slamming

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[96] 47 U.S.C. § 160(a).

[97] *See id.* at § 160(a)(1).

[98] *See id.* at § 160(a)(2).

[99] *See id.* at § 160(a)(3).

[100] *Id.* at § 160(b).

unprofitable, it promotes the public interest, including enhancing competition for telecommunications services.

2. When the Slammed Subscriber Pays the Unauthorized Carrier

34. We concluded above that a slammed subscriber is not liable for charges incurred during the first 30 days after an unauthorized carrier change.[101] In the event that a subscriber nevertheless pays the unauthorized carrier for slamming charges, two rules shall govern. First, the unauthorized carrier is obligated to remit to the authorized carrier all charges paid by the subscriber. Second, after receiving this amount from the unauthorized carrier, the authorized carrier shall provide the subscriber with a refund or credit for any amounts the subscriber paid in excess of what he or she would have paid the authorized carrier absent the unauthorized change.

a. Liability of the Unauthorized Carrier

35. We adopt the rule proposed in the *Further Notice and Order* to provide that any telecommunications carrier that violates the Commission's verification procedures and that collects charges for telecommunications service from a subscriber shall be liable to the subscriber's properly authorized carrier in an amount equal to all charges paid by such subscriber after such violation. This remedy is directed specifically by the language in section 258(b) of the Act.[102] All of the parties commenting on the proposed rule support this approach.[103] Consistent with the discussion above, this rule will apply in situations in which the subscriber has paid charges to an unauthorized carrier.

36. We also impose certain additional penalties on unauthorized carriers. As proposed in the *Further Notice and Order*, we also require the unauthorized carrier to pay for reasonable billing and collection expenses, including attorneys' fees, incurred by the authorized carrier in collecting charges from the unauthorized carrier.[104] Several commenters

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[101] *See supra* discussion on Liability of Subscribers to Carriers.

[102] *Further Notice and Order*, 12 FCC Rcd at 10691. *See* Appendix A, §§ 64.1100(c); 64.1170(a)(2)(A).

[103] *See, e.g.*, ACTA Comments at 36; GTE Comments at 15; Sprint Comments at 26; Telco Comments at 9.

[104] *Further Notice and Order*, 12 FCC Rcd at 10,691. See also Appendix A, § 64.1170(b). Although the authorized carrier may collect attorneys' fees incurred in collecting charges from the unauthorized carrier prior to the filing of a formal complaint with the Commission, the Commission has no authority to award attorneys' fees incurred *during* litigation before the Commission. *See Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*, 11 FCC Rcd 11202, 11208 (1996); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 100 FCC 2d 1244, 1259 (1985).

support the imposition of these additional penalties.[105] Although section 258 only requires the unauthorized carrier to remit to the authorized carrier all charges collected from the slammed subscriber, we conclude that we have authority to grant the authorized carrier additional remedies.[106] Requiring the unauthorized carrier to pay for expenses incurred by the authorized carrier in collecting charges from the unauthorized carrier ensures that the authorized carrier does not suffer further economic loss because of the unauthorized change, and adds an economic incentive for the authorized carrier to seek reimbursement for slamming. Additionally, since the rule increases the penalty for slamming, the unauthorized carrier may facilitate reimbursement to the authorized carrier in order to avoid payment of any additional expenses for billing and collection. Although several commenters support this rule,[107] several other commenters object, arguing that such expenses would be difficult to determine.[108] We disagree because we find that carriers are sophisticated business entities that are well aware of the expenses of collection, including litigation costs. Moreover, we believe that collection expenses likely will become standardized among carriers in the relatively near future. More importantly, we conclude that an unscrupulous carrier should bear full financial responsibility for the costs of its unlawful actions.

37. We also require the unauthorized carrier to pay for the expenses of restoring the subscriber to his or her authorized carrier.[109] We have previously stated that where an interexchange carrier submits a request that is disputed by a subscriber and the interexchange carrier is unable to produce verification of that subscriber's change request, the LEC must assess the applicable change charge against that interexchange carrier.[110] We codify and expand our prior requirement to encompass any carrier, not just an interexchange carrier, that is unable to provide verification of a subscriber's change request. By requiring the unauthorized carrier to pay the change charge to the authorized carrier, we ensure that neither the authorized carrier nor the subscriber incurs additional expenses in restoring the subscriber to his or her preferred carrier. Furthermore, requiring the unauthorized carrier to pay these additional charges will serve as a further deterrent to unauthorized changes.

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[105] *See, e.g.*, Ameritech Comments at 27, n.6; Bellsouth Comments at 14; GTE Comments at 15, n.33; MCI Comments at 20; NAAG Comments at 8; SBC Comments at 12.

[106] Because section 258 states that "the remedies provided by this subsection are in addition to any other remedies available by law," the Commission is not limited to using only the remedy contained in section 258. 47 U.S.C. § 258. *See also* 47 U.S.C. §§ 4(i); 201(b).

[107] *See, e.g.*, Ameritech Comments at 27, n.16; BellSouth Comments at 14.

[108] *See, e.g.*, BIC Comments at 8; Texas Commission Comments at 6.

[109] *See* Appendix A, §§ 64.1100(d)(2), 64.1170(a)(2)(B). *See, e.g.*, SBC Comments at 12; TRA Comments at 15; WorldCom Comments at 14.

[110] *See Illinois CUB Order*, 2 FCC Rcd at 1729.

b. Subscriber Refunds or Credits

38. Our new rules will enable subscribers to prevent carriers from profiting by absolving them of liability for the first 30 days after an unauthorized change. We conclude, however, that the specific provisions of section 258(b) appear to prevent us from absolving consumers of liability to the extent that they have already made payments to their unauthorized carriers.[111] We conclude that Congress intended that subscribers who pay for slamming charges should pay no more than they would have paid to their authorized carriers for the same service had they not been slammed.[112] Indeed, the legislative history reflects Congressional intent that "the Commission's rules should also provide that consumers be made whole."[113] Therefore our rules will require the authorized carrier to refund or credit the subscriber for any charges collected from the unauthorized carrier in excess of what the subscriber would have paid the authorized carrier absent the switch. This approach is consistent with the Commission's current rules that ensure that the slammed subscriber pays no more for service than he or she would have paid before the unauthorized switch. Furthermore, we conclude that requiring a refund of the excess amounts paid by the subscriber does not harm the authorized carrier who has in fact received payment for service that it did not provide to the subscriber. Should the authorized carrier conclude that it is suffering some financial harm, nothing in our rules would preclude the carrier from filing a claim against the unauthorized carrier for lost profits or other damages.[114]

39. We require the authorized carrier to refund or credit the subscriber with any amounts the subscriber paid in excess of the authorized carrier's rates, after the authorized carrier has received from the slamming carrier all amounts paid by the subscriber to the slamming carrier.[115] This will prevent the slammed consumer from being financially harmed by the unauthorized change, in accordance with the Commission's belief, as stated in the

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[111] Section 258(b) states that "[a]ny telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation." 47 U.S.C. § 258(b).

[112] *See* Appendix A, §§ 64.1100(d)(1). We realize that this rule appears to treat slammed consumers differently, by absolving of liability those consumers who do not pay unauthorized charges, while not providing a complete refund to consumers who may inadvertently pay such charges. We propose in the Further Notice of Proposed Rulemaking a way to provide a complete refund to subscribers who have paid their slamming carriers while still complying with the language of Section 258. *See infra* Further Notice of Proposed Rulemaking, Recovery of Additional Amounts from Unauthorized Carriers.

[113] Joint Explanatory Statement at 136.

[114] For example, a carrier could file a complaint with the Commission pursuant to section 208. *See* 47 U.S.C. § 208.

[115] *See* Appendix A, § 64.1170(d).

Further Notice and Order, that a slammed subscriber should receive prompt and full reparation for harm suffered as a consequence of unauthorized carrier changes.[116] We note that section 258 only requires that the unauthorized carrier remit to the authorized carrier all charges paid by the subscriber after the unauthorized change.[117] We conclude that we have authority to impose these requirements on authorized carriers to prevent subscribers from suffering further harm from slamming.[118] Moreover, the legislative history, which mentions restoring lost premiums to slammed subscribers, demonstrates Congressional concern that subscribers do not suffer losses due to being slammed.[119] The authorized carrier may keep the amount that it would have earned absent the unauthorized switch and refund or credit the difference to the subscriber.

40. If the authorized carrier fails to collect the charges paid by the subscriber from the unauthorized carrier, the authorized carrier is not required to provide a refund or credit to the subscriber.[120] The authorized carrier, who has done no wrong, should not be penalized by having to provide the subscriber with a refund paid out of the authorized carrier's pocket. The authorized carrier, however, has an affirmative obligation to notify the subscriber in a timely fashion of its failure to collect the charges paid by the subscriber to the unauthorized carrier. We require the authorized carrier to notify the subscriber within 60 days after the subscriber has notified the authorized carrier of an unauthorized change, if the authorized carrier has failed to collect from the unauthorized carrier the charges paid by the slammed subscriber.[121] This failure to collect may be due to the slamming carrier's refusal to cooperate, or it may stem from the authorized carrier's decision not to pursue its claims against the slamming carrier. Upon receipt of the notification, the subscriber will have the opportunity to pursue a claim against the slamming carrier for a full refund of all amounts paid to the slamming carrier. The subscriber is entitled to the entire amount paid, rather than merely a refund or credit of charges paid in excess of the authorized carrier's rates. This is because it is the subscriber who is collecting the charges from the slamming carrier rather

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[116] *Further Notice and Order*, 12 FCC Rcd at 10691.

[117] *See* 47 U.S.C. § 258(b).

[118] *See* 47 U.S.C. §§ 201(b) (granting the Commission authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act"); 4(i) (granting the Commission authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions").

[119] Congress states that "the Commission's rules should require that carriers guilty of 'slamming' should be liable for premiums, including travel bonuses, that would otherwise have been earned by telephone subscribers but were not earned due to the violation of the Commission's rules. . . ." Joint Explanatory Statement at 136.

[120] *See* Appendix A, § 64.1170(d)(1).

[121] *Id.*

than the authorized carrier. The language of section 258(b) generally prevents the subscriber from being absolved of liability for charges paid because it indicates that the authorized carrier may make a claim for, and keep, amounts paid to the slamming carrier.[122] Where the authorized carrier has failed in collecting charges from the slamming carrier, however, the language of section 258(b) would not apply. Therefore the subscriber, who is not bound by the carrier remedy in section 258(b), would be entitled to a refund from the slamming carrier of all slamming charges paid. If the subscriber has difficulty in obtaining this refund from the slamming carrier, the subscriber has the option of filing a complaint with the Commission pursuant to section 208.[123] We anticipate that, with continued consumer awareness and education about our slamming liability rules, fewer and fewer consumers will find themselves in the situation of having paid their slamming carriers. We are confident that eventually slamming carriers will be completely unable to profit because consumers will refuse to pay them.

3. Investigation and Reimbursement Procedures

a. When the Subscriber Has Not Paid the Unauthorized Carrier

41. A subscriber may refuse to pay any charges imposed by the slamming carrier for 30 days after the unauthorized change occurred.[124] As stated above, we conclude that this simple remedy will prevent slamming carriers from profiting and will also compensate the consumer for the confusion and inconvenience of being slammed. The record supports, however, giving the carrier who has been deprived of charges the opportunity to refute a subscriber's slamming claim.[125] We therefore impose the following mechanism to limit the ability of subscribers to fraudulently claim that they have been slammed.

42. After the subscriber has reported an allegedly unauthorized change and requested to be switched back to the authorized carrier, the slamming carrier shall remove from the subscriber's bill, whether billed through a LEC or otherwise, all charges that were

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[122] *See* 47 U.S.C. § 258(b) (stating that an unauthorized carrier must remit to the authorized carrier all charges paid by a subscriber after being slammed).

[123] *See* 47 U.S.C. § 208. We note that in the *Further Notice and Order*, we proposed to require carriers to pursue private settlement negotiations prior to filing a formal complaint with the Commission to resolve slamming liability. The Commission subsequently revised its formal complaint rules to require parties to certify that they have attempted to discuss settlement prior to filing any formal complaint. Therefore we decline to adopt any specific rule requiring parties to certify that they have attempted settlement in complaints regarding slamming liability.

[124] *See* Appendix A, § 64.1100(d).

[125] *See, e.g.*, AT&T Comments at 13.

incurred for the first 30 days after the unauthorized change occurred.[126] Several commenters stated that the carrier that is accused of slamming must have the opportunity to provide proof of verification.[127] Therefore, if the allegedly unauthorized carrier has proof of the consumer's valid verification of authorization to change to it, however, then such carrier may make a claim to the consumer's originally authorized carrier. Specifically, the allegedly unauthorized carrier shall, within 30 days of the subscriber's return to the originally authorized carrier, submit to the originally authorized carrier a claim for the amount of charges for which the consumer was absolved, along with proof of the subscriber's verification of the disputed carrier change.[128] The proof of verification should contain clear and convincing evidence that the subscriber knowingly authorized the carrier change, such as a written LOA or audiotape of an independent third party verification. The authorized carrier shall conduct a reasonable and neutral investigation of the claim, including, where appropriate, contacting the subscriber and the carrier making the claim.[129] Within 60 days after receipt of the claim and the proof of verification, the originally authorized carrier shall issue a decision to the subscriber and the carrier making the claim.[130] We note here that, regardless of the originally authorized carrier's decision on the validity of the disputed change, that carrier shall remain the subscriber's authorized carrier, since the subscriber has validly switched back to it. If the originally authorized carrier decides that the subscriber did in fact authorize a carrier change to the carrier making the claim, it shall place on the subscriber's bill a charge equal to the amount of charges for which the subscriber was previously absolved.[131] Upon receiving this amount, the originally authorized carrier shall forward this amount to the carrier making the claim.[132] If the authorized carrier determines that the subscriber was slammed by the carrier filing the claim, the subscriber shall not be required to make any payments for the charges for which he or she was absolved.[133] If either the subscriber or the carrier making the claim believes that the authorized carrier's investigation or adjudication of the dispute was in any way improper or wrong, then it has the option of filing a section 208 complaint.[134]

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[126] *See* Appendix A, § 64.1180(b). These charges shall be removed from the bill upon a subscriber's allegation that he or she was slammed.

[127] *See* AT&T Comments at 13, MCI *Ex Parte* Presentation of Nov. 17, 1998 at 2.

[128] *See* Appendix A, § 64.1180(c).

[129] *Id.* at § 64.1180(d).

[130] *Id.* at § 64.1180(e).

[131] *Id.* at § 64.1180(e)(1).

[132] *Id.*

[133] *Id.* at § 64.1180(e)(2).

[134] *See* 47 U.S.C. § 208.

b. When the Subscriber Has Paid the Unauthorized Carrier

43. When the subscriber has paid charges to the slamming carrier, the following procedures shall apply. First, we require the authorized carrier to submit to the allegedly unauthorized carrier, within 30 days of notification of an unauthorized change, a request for proof of verification of the subscriber's requested carrier change.[135] Our reimbursement procedure, as originally proposed in the *Further Notice and Order*, required the authorized carrier to make demand for payment on the unauthorized carrier within ten days of notification from its subscriber of an unauthorized change.[136] Some commenters contend, however, that the authorized carrier may need more time than the proposed ten days.[137] We agree that, under certain circumstances, a carrier may need more than ten days to make demand on an allegedly unauthorized carrier. Such circumstances could include, for example, situations in which the authorized carrier has difficulty in determining the identity of the unauthorized carrier or in contacting the unauthorized carrier.[138] Therefore, we require the authorized carrier to make demand on the allegedly unauthorized carrier within 30 days, which gives the authorized carrier sufficient time to prepare its demand while still enabling both carriers to resolve the dispute in a timely manner, thus permitting the authorized carrier to resolve issues of overcharges and lost premiums as quickly as possible for the subscriber.

44. Second, we require the allegedly unauthorized carrier to provide proof of verification, such as a copy of a written LOA or an audiotape recording of an independent third party verifier, to the authorized carrier within ten days of the authorized carrier's request.[139] If the allegedly unauthorized carrier does provide proof of verification, consistent with the Commission's verification procedures, of the disputed carrier change request, then the burden shifts to the authorized carrier to prove that an unauthorized change occurred.[140] The proof of verification must provide clear and convincing evidence that the subscriber provided knowing authorization of a carrier change.

45. If the allegedly unauthorized carrier cannot provide proof of verification, then it must provide to the authorized carrier, also within ten days of the authorized carrier's request for proof of verification, a copy of the subscriber's bill, an amount equal to any charge

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[135] *See* Appendix A, § 64.1170(a).

[136] *Further Notice and Order*, 12 FCC Rcd at 10732.

[137] *See, e.g.*, AT&T Comments at 12; MCI Comments at 19 n.22; U S West Reply Comments at 31.

[138] *See, e.g.*, AT&T Comments at 12; MCI Comments at 19 n.22; U S West Reply Comments at 31.

[139] *See* Appendix A, § 64.1170(a)(1).

[140] The authorized carrier might attempt to prove that an unauthorized change occurred in a section 208 complaint proceeding, for example.

required to return the subscriber to his or her authorized carrier, and an amount equal to any charges paid by the subscriber, if applicable.[141] In adopting these rules, we take into account several of the commenters' viewpoints. AT&T suggests that the unauthorized carrier be required to provide proof of compliance with the Commission's verification rules by a certain deadline,[142] while TOPC and U S West suggest that the unauthorized carrier be required to forward all bills and money paid by a certain deadline.[143] We therefore provide the allegedly unauthorized carrier with the opportunity to prove that it did comply with our verification rules. We also require the allegedly unauthorized carrier to respond by a set deadline. If it is determined that an unauthorized change has occurred, timely receipt by the authorized carrier of the subscriber's bill and any charges paid will enable the authorized carrier to provide a quick resolution for the subscriber. In the event that the authorized carrier is unable to obtain an appropriate response from the slamming carrier, the authorized carrier may bring an action in federal or state court, where appropriate, or before the Commission, against the slamming carrier.[144] Furthermore, as discussed above, the authorized carrier must also notify the subscriber of its failure to collect charges within 60 days after the subscriber has notified the authorized carrier of an unauthorized change, so that the subscriber may also attempt to collect a full refund of all amounts paid to the slamming carrier for charges incurred during the first 30 days after the unauthorized change.[145]

46. We note that NAAG suggests that the unauthorized carrier's duty to send information and reimbursement to the authorized carrier should be triggered additionally by notification from the LEC, another carrier, or a government agency.[146] ACTA opposes expanding the number of parties who can set the reimbursement procedure in motion because the only relevant parties to the dispute are the unauthorized carrier, the properly authorized carrier, and the subscriber.[147] We find that the authorized carrier should be the party to make demand on the unauthorized carrier, although the authorized carrier may do so upon notification by the subscriber or the executing carrier. We find that confusion could result if unauthorized carriers are required to respond to several different parties within the deadlines we have set. This rule does not negate any other obligations an unauthorized carrier may

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[141] *See* Appendix A, § 64.1170(a)(2).

[142] AT&T Comments at 13. *See also* MCI *Ex Parte* Presentation of Nov. 17, 1998 at 2.

[143] TOPC Comments at 4; U S WEST Reply Comments at 31.

[144] *E.g.*, the authorized carrier would have a cause of action in a formal complaint filed pursuant to section 208 of the Act. 47 U.S.C. § 208.

[145] *See* Appendix A, § 64.1170(d)(1).

[146] NAAG Comments at 8.

[147] ACTA Reply Comments at 22.

have to respond to service of a complaint, such as the obligation to respond within 30 days to a notice of a consumer complaint issued by the Commission, pursuant to section 208 of the Act.[148] We also do not purport to preempt the activities of states who take action against slamming carriers.[149]

3. Restoration of Premiums

47. Premiums are bonuses, such as frequent flier miles, that are given to subscribers as rewards for each dollar spent on telecommunications services. The Commission noted in the *Further Notice and Order* that although section 258 does not specifically address the restoration of premiums, the legislative history states that "the Commission's rules should require that carriers guilty of 'slamming' should be liable for premiums, including travel bonuses, that would otherwise have been earned by telephone subscribers but were not earned due to the violation of the Commission's rules. . . ."[150] We find, based on the legislative history, that Congress intended for subscribers to be reinstated in their premium programs and receive restoration of premiums that were lost due to slamming.[151]

48. We require an authorized carrier to reinstate the subscriber in any premium program in which the subscriber was enrolled prior to being slammed, if that subscriber's participation in the premium program was terminated because of the unauthorized change.[152] The record also supports a requirement that the authorized carrier restore to the subscriber any premiums that the subscriber lost due to slamming if a subscriber has paid the unauthorized carrier for slamming charges.[153] Once an authorized carrier receives from the slamming carrier all charges that the subscriber paid, the authorized carrier has been made whole and is obligated to restore the subscriber's premiums. Since the authorized carrier in this event has received at least what it would have been entitled to absent the slam, they are no worse off from having to provide any premiums that subscribers would have received. We emphasize that the authorized carrier is entitled to receive from the slamming carrier charges paid by the slammed subscriber, and we expect that authorized carriers will make every effort to pursue

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[148] 47 U.S.C. § 208.

[149] *See infra* discussion in The States' Role.

[150] *See Further Notice and Order*, 12 FCC Rcd at 10692, *citing* Joint Explanatory Statement at 136.

[151] *Cf.* LCI Reply Comments at 18-19 (stating that because section 258 does not reference any carrier-subscriber liability, the Commission should not adopt any requirements as to restoration of premiums).

[152] *See* Appendix A, § 64.1170(e).

[153] *See, e.g.*, Ameritech Comments at 28-29; TOPC Reply Comments at 6.

their claims against slamming carriers.[154] In the event that an authorized carrier is unable to recover from the unauthorized carrier charges that were paid by the subscriber, however, the authorized carrier is still required to restore the subscriber's premiums.[155] A subscriber who has paid slamming charges deserves to receive the premiums that would have accompanied such payment in the absence of the unauthorized carrier change. Although this rule may result in some authorized carriers having to restore premiums without being compensated, we conclude that this is necessary to fulfill the intent of Congress and to prevent the subscriber from suffering any losses from being slammed. The authorized carrier is the only entity that is in a position to compensate subscribers for lost premiums and we believe that a carrier's cost of providing premiums is minimal. Furthermore, an authorized carrier that knows that it must restore premiums to subscribers who have paid slamming charges will make greater efforts to recover such charges from the unauthorized carrier. Encouraging carriers to pursue their claims against unauthorized carriers will increase enforcement efforts against all carriers who make unauthorized changes. On the other hand, an authorized carrier is not required to restore any premiums lost by that subscriber if the subscriber has not paid for the charges incurred after being slammed. Several commenters agree with our view that premiums should not be restored to subscribers who do not pay any charges.[156] To do otherwise would grant the subscriber a windfall. It is sufficient that the subscriber be reinstated in any premium program from which he or she was terminated due to the unauthorized change.

49. Although the Commission proposed in the *Further Notice and Order* to require the unauthorized carrier to remit to the properly authorized carrier an amount equal to the value of premiums to be restored to the subscriber,[157] we find that this is not necessary to enable the authorized carrier to restore premiums to its subscribers. If the unauthorized change had never occurred, the authorized carrier would have provided the premium to the subscriber on the basis of the subscriber's payment to the authorized carrier. Therefore the authorized carrier is no worse off than it would have been if it is required to restore subscriber premiums upon receipt of the amount paid by the subscriber to the unauthorized carrier. In other words, we believe that charges for telephone service incorporate the cost of any premiums that may be given to subscribers. The authorized carrier does not need to collect from the slamming carrier both the charges paid by the subscriber and an amount equal to the cost of the premiums because the cost of the premiums has already been

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[154] Authorized carriers may, in addition to the remedies in the rules adopted in this *Order*, take legal action in the appropriate forum, including a complaint before the Commission or in a state or federal court.

[155] *See* Appendix A, § 64.1170(e). *See also* NYSCPB Comments at 11 (stating that the authorized carrier should promptly restore premiums even if the slamming carrier has not remitted the amounts paid by the subscriber).

[156] *See, e.g.*, Ameritech Comments at 29; North Carolina Commission Comments at 6-7; Virginia Commission Comments at 4; Working Assets Comments at 44.

[157] *Further Notice and Order*, 12 FCC Rcd at 10691.

incorporated into the charges paid by the subscriber.

4. Liability for Inadvertent Unauthorized Changes

50. We reiterate that the statute and our rules impose liability for any unauthorized change in a subscriber's preferred carrier, whether intentional or inadvertent.[158] Section 258 of the Act makes it illegal for a carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[159] Although several commenters assert that our rules should apply only to intentional acts that result in slamming,[160] the statutory language does not establish an intent element for a violation of section 258. Several commenters, such as Ameritech, BellSouth, and the North Carolina Commission, support the application of a strict liability standard, in which a carrier would be liable for slamming if it was responsible for an unauthorized change, regardless of whether the unauthorized carrier did so intentionally.[161] We agree that such a strict liability standard is required by the statute.

51. GTE, Frontier, and U S WEST argue that imposing liability for actions that are not intentional or willful would abrogate common carriers' limited liability tariff provisions.[162] We disagree because we cannot condone allowing carriers to protect themselves from liability for unlawful or fraudulent conduct through the use of tariff provisions. Furthermore, the language of section 258 prohibits all unauthorized carrier changes and does not impose any requirement that such carrier change be intentional.[163] ACTA contends that defining slamming to include inadvertent acts is so vague that it "creates numerous constitutional concerns."[164] ACTA contends that imposing liability on carriers who are merely negligent may infringe upon First Amendment rights because "it is feared that regulators are consciously stretching the definition of slamming to encompass those customers who switch carriers based

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[158] We note that a CMRS provider's change of a subscriber's toll carrier would not be considered an unauthorized change under our rules because CMRS providers may change their toll carriers without the approval of their subscribers, unless they have contracted otherwise with their subscribers. *See supra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

[159] 47 U.S.C. § 258(a).

[160] *See, e.g.*, ACTA Comments at 10; Frontier Comments at 3.

[161] *See, e.g.*, Ameritech Reply Comments at 27; BellSouth Reply Comments at 3; North Carolina Commission Comments at 12.

[162] GTE Comments at 7; Frontier Comments at 14; US WEST Comments at 48-49.

[163] *See* 47 U.S.C. § 258.

[164] ACTA Comments at 11.

on allegedly misleading marketing materials."[165] We do not agree that, by including unintentional unauthorized changes, we are "stretching" the definition of slamming, since it is Congress, not the Commission, that has concluded that any unauthorized change in subscriber selection is considered to be slamming.[166] Further, the First Amendment does not provide absolute immunity for negligent or other non-intentional conduct simply because that conduct relates to speech.[167] ACTA also argues that defining slamming to include inadvertent acts is so vague that it will lead to selective enforcement.[168] Again, we disagree. We conclude, in fact, that defining slamming to include all unauthorized carrier changes, whether inadvertent or intentional, is in fact a bright line standard that will minimize the threat of selective enforcement because it does not depend on divining the subjective intent of the violator. Finally, ACTA contends that requiring a carrier who is merely negligent to remit revenues to the former carrier would constitute a taking in violation of the Fifth Amendment, because that carrier has done no wrong.[169] We disagree with ACTA that our rules impact any takings issues because we conclude that a slamming carrier has no property rights in the charges for unauthorized service collected from another carrier's subscribers. More importantly, ACTA's assertion is simply mistaken in assuming that a carrier committing a negligent act has not committed a "wrong." Negligent conduct gives rise to liability and in this context, carriers have an affirmative obligation to both obtain authorization from the consumer and to verify that authorization. Any failure to fully and accurately comply with these requirements is not acceptable under either the statute or our rules.

52. We conclude that holding carriers liable for both inadvertent and intentional unauthorized changes to subscribers' preferred carriers will reduce the overall incidence of slamming and is consistent with section 258. We find that the rights of the consumer and the authorized carrier to remedies for slamming should not be affected by whether the slam was an intentional or accidental act. Regardless of the intent, or lack thereof, behind the unauthorized change, the consumer and the authorized carrier have suffered injury. We agree with those commenters who assert that imposing liability for both inadvertent and intentional carrier changes will make all carriers more vigilant in preventing unauthorized carrier changes

[165] ACTA Comments at 15.

[166] Joint Explanatory Statement at 136.

[167] *See, e.g., Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (1992) (stating that the First Amendment permits the imposition of liability for negligently publishing a commercial advertisement that makes it apparent that there is a substantial danger of harm to the public), *cert. denied, Soldier of Fortune Magazine, Inc. v. Braun*, 506 U.S. 1071 (1993).

[168] ACTA Comments at 16.

[169] *Id.* at 17.

and provide carriers with incentive to correct errors in a speedy and efficient manner.[170] We conclude that holding carriers liable for all unauthorized changes provides appropriate incentives for carriers to obtain authorization properly and to implement their verification procedures in a trustworthy manner. We recognize, however, that even with the greatest care, innocent mistakes will occur and may result in unauthorized changes. In such cases, we will take into consideration in any enforcement action the willfulness of the carriers involved.

4. Determining Liability Between Carriers

53. Section 258 requires both the submitting and executing telecommunications carriers to ensure that a carrier change comports with procedures established by the Commission to protect consumers and promote fair competition.[171] Hence, to the extent that a submission or execution fails to comport with established procedures, the Act contemplates that either or both telecommunications carriers could be liable for an unauthorized change in a subscriber's telecommunications service. In order to avoid or minimize disputes over the source or cause of unauthorized carrier changes, or over liability for such carrier changes, we delineate the duties and obligations of the submitting and executing carriers.

54. As proposed in the *Further Notice and Order*, we adopt the following "but for" liability test: (1) where the submitting carrier submits a carrier change request that fails to comply with our rules and the executing carrier performs the change in accordance with the submission, only the submitting carrier is liable as an unauthorized carrier;[172] (2) where the submitting carrier submits a change request that conforms with our rules and the executing carrier fails to execute the change in conformance with the submission, only the executing carrier is liable for the unauthorized change;[173] and (3) finally, where the submitting carrier submits a carrier change request that fails to comply with our rules and the executing carrier fails to perform the change in accordance with the submission, only the submitting carrier is

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[170] *See, e.g.*, BellSouth Reply Comments at 3.

[171] Section 258 makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." 47 U.S.C. § 258.

[172] Where a submitting carrier is liable for an unauthorized change, the subscriber is absolved of liability for charges incurred during the first 30 days after being slammed. If the subscriber pays slamming charges, the submitting carrier will be liable to the authorized carrier for such charges, as well as for additional amounts such as billing and collection expenses. *See* Appendix A, §§ 64.1100, 64.1170.

[173] Where an executing carrier is liable for an unauthorized carrier change, it may be subject to liability for damages proved in state or federal court, Commission proceedings, or forfeiture penalties imposed by the Commission pursuant to section 503(b) of the Act. *See, e.g.*, 47 U.S.C. §§ 208, 503(b).

liable as an unauthorized carrier.[174] The majority of parties commenting on this issue support the adoption of the proposed liability test.[175] They agree that this test not only properly allocates liability for unauthorized carrier changes, but also establishes clear standards for when liability will be imposed. With these clear standards, carriers can take appropriate measures to protect themselves against liability and therefore reduce all instances of slamming, whether intentional or inadvertent.[176]

B. Third Party Administrator for Dispute Resolution

55. We have formulated several mechanisms in this *Order* that rely on the authorized carrier to provide relief to its slammed subscribers and to determine whether its subscriber was slammed.[177] We believe that these requirements form a necessary baseline for ensuring that consumer problems arising from slamming are addressed adequately. We recognize, however, that some carriers may find it to be in their interest to make other mutually agreeable arrangements that might better serve to address our concerns. For instance, several carriers, particularly MCI, have indicated that they are willing and able to create quickly a system using an independent third party administrator to discharge carrier obligations for resolving disputes among carriers and subscribers with regard to slamming, including re-rating subscriber telephone bills and returning the subscriber to the proper carrier.[178] We agree that this concept has merit. Consumers would benefit by having one point of contact to resolve slamming problems. Carriers would benefit by having a neutral body to resolve disputes regarding slamming liability. LECs would no longer be the recipients of angry phone calls from consumers who have been slammed by long distance

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[174] *Further Notice and Order*, 12 FCC Rcd at 10693. As a practical matter, a carrier change request submission should always precede a carrier change execution; thus, the liability of an executing carrier for unauthorized carrier changes would only be addressed after the actions of the submitting carrier are considered.

[175] *See, e.g.*, Ameritech Comments at 30; Sprint Comments at 27; CompTel Comments at 13.

[176] *See, e.g.*, Ameritech Comments at 30; IXC Long Distance Reply Comments at 4.

[177] *See supra* discussions on Investigation and Reimbursement Procedures and Liability Between Carriers.

[178] *See, e.g.*, Letter from Leonard S. Sawicki, MCI WorldCom, to Magalie Roman Salas, FCC (November 25, 1998). In response to the Commission's request for comment in the *Further Notice and Order* on the use of an independent third party to execute carrier changes neutrally, MCI suggests that an independent third party administrator could also provide a negotiation or dispute resolution function for the industry. MCI Comments at 24, n.24. *Further Notice and Order*, 12 FCC Rcd at 10644. More generally, some carriers are concerned that as the competitive marketplace changes, LECs may have a conflict of interest between their role as LEC and their role as an affiliate of an interexchange competitor. *See, e.g.*, Letter from Bruce K. Cox, AT&T, to John Muleta, Federal Communications Commission (Sept. 27, 1996). AT&T suggests that "to avoid the inherent conflict of interest between competing carriers, serious consideration should be given to establishing procedures under which neutral third parties administer PIC protection." *Id.*

carriers, while IXCs would be able to divert their resources to preventing slamming rather than resolving slamming disputes. Although this approach holds promise, we do not believe that we should abandon the rules adopted herein because they provide an appropriate mechanism for all carriers to render appropriate relief and dispute resolution to slammed consumers and carriers. We do, however, encourage carriers to work out such arrangements and we will be open to receiving requests for waiver of the liability provisions of our rules for carriers that agree to implement an acceptable alternative.

56. To afford carriers time to develop and implement an industry-funded independent dispute resolution mechanism and to file waiver requests as described above, we delay the effective date of the liability rules set forth above until 90 days after Federal Register publication of this *Order*.[179] We note that this is not a substantial delay in light of the fact that, due to statutory constraints, the rules adopted in this *Order*, aside from the liability rules, will not be effective until 70 days after publication in the Federal Register.[180] Any waiver request must be filed in a timely manner so that the Commission may evaluate and grant or deny such request in enough time to enable carriers to implement and utilize the mechanism by the effective date of the liability rules. In submitting waiver requests, carriers should bear in mind that we would be inclined to grant a waiver only if we are satisfied that any such neutral entity would fulfill the obligations imposed by our rules with regard to liability, in the timeframes specified in the rules.[181] Therefore, for example, with regard to charges imposed on slammed subscribers, the neutral administrator would be charged with ensuring that subscribers are absolved of liability for unpaid charges assessed by slamming

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[179] The effective date of the following rule provisions in Appendix A would be delayed for 90 days: section 64.1100(c), (d); section 64.1170; section 64.1180. Section 64.1100(c) deals with the slamming carrier's liability to the authorized carrier for charges paid by a slammed subscriber. Section 64.1100(d) deals with the subscriber's liability for slamming charges. Section 64.1170 deals with the reimbursement procedures for subscribers who have paid charges to their slamming carriers. Section 64.1180 deals with investigation procedures for carriers who wish to dispute a subscriber's claim of slamming after the subscriber has refused to pay charges. During this 90-day period, the Commission's current slamming liability policies will remain in place -- that is, the subscriber shall be liable to the slamming carrier for charges incurred after being slammed at the authorized carrier's rates.

[180] The rules adopted in this *Order* contain new and revised collections of information that must be approved, prior to their effective date, by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. 44 U.S.C. § 3502, *et seq.* The OMB has 60 days after the publication of any new or revised information collection in the Federal Register to review such information collection. *See* 44 U.S.C. § 3507. Therefore all of the rules adopted in this *Order* would not be effective until 70 days after publication in the Federal Register (some extra time is added in the event of a delay by OMB). By delaying the effective date of the liability rules until 90 days after publication in the Federal Register, we only delay their effective date for 20 days after the effective date of the remaining rules adopted in this *Order*.

[181] We note that waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

carriers for the first 30 days after an unauthorized carrier change has occurred and that such charges are removed from the subscribers' telephone bills. Any charges assessed by the slamming carrier after this 30-day period would be re-rated to the authorized carrier's rates, if lower, to enable the subscriber to pay the authorized carrier. If the subscriber pays the slamming carrier, the neutral administrator also would be charged with ensuring that the slamming carrier remits all such amounts to the authorized carrier, as well as reasonable billing and collection expenses and any applicable change charges. The administrator should also ensure that, under appropriate circumstances, the subscriber receives a refund or credit of any amounts paid in excess of what the authorized carrier would have charged, as well as premiums if applicable. If the administrator fails to collect any amounts from the slamming carrier, it would be responsible for informing the subscriber of his or her rights with respect to charges paid. The third party administrator should be the investigator and arbiter for resolving disputes where the slamming carrier claims that it had proper authorization and verification of the subscriber's request to change carriers. We note that nothing in the Commission's liability rules or the use of the third party administrator shall preclude a consumer or carrier from filing a section 208 complaint or other action in state or federal court.[182]

57. We encourage carriers to develop a plan that ideally enables the consumer to resolve his or her slamming problem with a single contact. We find that it would be greatly beneficial to provide the consumer with the ability to call one entity to explain the slamming problem, and have that entity switch the consumer back to the proper carrier, re-rate bills, provide refunds, and determine whether a slam has occurred in the event that a carrier claims that a change was authorized. This would provide the consumer with a convenient way to undo the damage caused by slamming. Furthermore, having one neutral party administer these numerous and complicated tasks would lessen any confusion that might be caused if several parties -- the consumer, the slamming carrier, the LEC, and the authorized carrier -- attempt to resolve the same problem at the same time.

C. Verification Rules

1. The Welcome Package

a. Background

58. One of the verification procedures available to carriers under the Commission's rules is the "welcome package." As set forth in section 64.1100(d), after obtaining the subscriber's authorization to make a carrier change, the IXC may send the consumer a welcome package containing information and a prepaid postcard, which the customer can use to deny, cancel, or confirm the change order. Section 64.1100(d)(8) provides that the package

[182] *See, e.g.*, 47 U.S.C. § 208.

must contain a statement that if the subscriber does not return the postcard, the subscriber's long distance service will be switched within 14 days after the date the package was mailed.[183] In its petition for reconsideration of the *1995 Report and Order*, the National Association of Attorneys General (NAAG) asked the Commission to eliminate the automatic switching of consumers who do not return a postcard to the IXC because this aspect of the welcome package was a "negative-option" LOA.[184] A negative-option LOA, which is prohibited under section 64.1150(f), is an unsolicited notice of a pending carrier change that requires a consumer to take some action to *avoid* the change.[185] In the *Further Notice and Order*, the Commission sought comment on whether the welcome package verification option should be eliminated because it could be used in the same manner as a negative-option LOA.[186]

b. Discussion

59. The record, as well as our experience with consumer complaints, supports our decision to eliminate the welcome package as a verification option.[187] The welcome package has been a significant source of consumer complaints regarding slamming. As many of the commenters note, consumers often fail to receive the welcome package, or they throw it away as junk mail, or they have their service switched despite the fact that they returned postcards requesting that their service not be changed.[188] The welcome package becomes a particularly ineffective verification method when used in combination with a misleading telemarketing script. If a subscriber does not even realize that he or she has agreed to change his or her service because the telemarketing solicitation was so misleading, that subscriber would reasonably conclude that the welcome package is a solicitation, not a confirmation, and thus discard it without examination.[189] In all instances, however, we find that the welcome package is an ineffective verification method because it does not provide evidence, such as a written signature or recording, that the subscriber has in fact authorized a carrier change. Moreover, even where the subscriber actually receives and reads the information in a welcome

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[183] 47 C.F.R. § 64.1100(d)(8).

[184] NAAG Petition for Reconsideration at 16-17.

[185] 47 C.F.R. § 64.1150(f).

[186] *Further Notice and Order* at 10685.

[187] *See, e.g.*, Ameritech Comments at 18; NAAG Comments at 4.

[188] *See, e.g.*, Florida Commission Comments at 3; NYSDPS Comments at 7; TOPC Comments at 2. *See, e.g.*, Informal Complaint of James E. Robertshaw, IC 97-22801 (alleging that even though the customer returned the postcard to cancel the carrier change, his phone service was switched).

[189] For example, an unscrupulous telemarketer may convince a subscriber to consolidate his or her long distance and local exchange bill without explaining to the subscriber that this involves a change in carriers.

package, this approach places an affirmative burden on the subscriber to avoid having his or her preferred carrier switched. As with negative-option LOAs, we do not think consumers should have to take affirmative action to avoid being slammed.

60. Despite these consumer problems, many of the IXCs contend that the welcome package option should be kept because it is an economical method of verification.[190] These commenters argue that the welcome package does not work like a negative-option LOA because the welcome package confirms consent already given.[191] Although we agreed in the *Further Notice and Order* that there is a distinction between a post-sale verification and a negative-option LOA, we stated that, in practice, this distinction is easily blurred because a welcome package can be used to switch a subscriber who has not previously consented to a carrier change.[192] We have seen many instances where unscrupulous carriers used the welcome package as a negative-option LOA by sending it to consumers from whom they have not obtained prior consent, and where such oral consent was obtained based on false or misleading telemarketing pitches.[193] Thus, the argument that the welcome package is a benign form of verification because it merely confirms consent already given begs the question of whether consent in fact has been given. Also, like negative-option LOAs, there is no evidence after the switch that the welcome package was ever received, or mailed for that matter, by the correct party or that the party to whom it was sent was in fact authorized to change the preferred carrier for that telephone line.

61. We decline to adopt modifications to the welcome package, rather than eliminate the option, as suggested by several commenters,[194] because we do not believe that any of the proposed changes would decrease significantly the fraudulent potential of the welcome package without also decreasing its utility. For example, several commenters, including NYSDPS and WorldCom, suggest that if the welcome package is not eliminated, then it should contain a positive-option postcard, so that a carrier change would not be considered verified until the customer signed and returned the postcard.[195] Although

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[190] *See, e.g.*, ACTA Comments at 25; TRA Comments at 11.

[191] *See, e.g.*, AT&T Comments at 5-6; 360o Comments at 4.

[192] *Further Notice and Order*, 12 FCC Rcd at 10705.

[193] *See, e.g.*, Ameritech Comments at 18; Illinois Commission Comments at 3; NAAG Comments at 4; NYSDPS Comments at 7; OCC Comments at 3. We have received many consumer complaints in which consumers allege that their service was changed despite the fact that they only asked for information to be mailed to them, but did not agree to switch their service. *See, e.g.*, Informal Complaint of J. Brian Lison, IC 98-42237 (stating that the customer's long distance carrier was changed even though the customer only agreed to receive a brochure about the carrier's service).

[194] *See, e.g.*, ACTA Comments at 26; TNRA Comments at 2.

[195] *See, e.g.*, NYSDPS Comments at 7; WorldCom Comments at 7.

requiring a positive-option postcard requirement might minimize one of the fraudulent aspects of the welcome package, we agree with AT&T that such a requirement merely transforms the welcome package into a written LOA requirement, which is already a verification option under our rules.[196] ACTA states that carriers could prove that consumers received a welcome package by using certified mail, or by maintaining mailing manifests.[197] We decline to adopt these proposals. Although such proposals may prove that a customer received a welcome package, they would not prevent carriers from sending welcome packages to consumers with whom they have never spoken or from whom they have not obtained valid consent. Nor would such proposals address the problem of consumers throwing away welcome packages as junk mail. We conclude that it is better to eliminate the welcome package entirely, rather than attempt to "fix" it with modifications that fail to provide adequate protection against fraud or that curtail its usefulness.

2. Application of the Verification Rules to In-Bound Calls

a. Background

62. The Commission concluded in the *1995 Report and Order* that it should extend our verification procedures to consumer-initiated "in-bound" calls.[198] On its own motion the Commission stayed the application of the verification rules to in-bound calls pending its decision on several petitions for reconsideration by AT&T, MCI, and Sprint.[199] In the *Further Notice and Order*, the Commission denied the petitions for reconsideration to the extent that they requested that the Commission decline to apply its verification rules to in-bound calls, but continued the stay.[200] In the *Further Notice and Order*, the Commission stated its belief that it serves the public interest to offer consumers who initiate calls to carriers the same protection under the verification rules as those consumers who are contacted by carriers and tentatively concluded that verification of in-bound calls is necessary to deter slamming.[201]

b. Discussion

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[196] AT&T Reply Comments at 4. *See* 47 C.F.R. §§ 64.1100(a), 64.1150.

[197] ACTA Comments at 26.

[198] *1995 Report and Order*, 10 FCC Rcd at 9560.

[199] *See* Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Order, 11 FCC Rcd 856 (1995) (*In-bound Stay Order*). The stay was imposed before the effective date of the *1995 Report and Order*. The consumer-initiated or in-bound telemarketing provision was the only component of the slamming rules that the Commission stayed.

[200] *Further Notice and Order*, 12 FCC Rcd at 10701.

[201] *Id.*

63. We find that verification of in-bound calls is necessary to deter slamming and, accordingly, we lift the stay imposed in the *In-bound Stay Order*. Our decision is supported by state commissions and some IXCs, including MCI and AT&T.[202] These commenters argue, and we agree, that the opportunity for slamming is as great with in-bound calls as with out-bound calls.[203] Equally important, we recognize that excluding in-bound calls from our verification requirements would open a loophole for slammers.[204] Through this loophole, unscrupulous carriers could slam not only consumers who initiate calls for reasons other than to change carriers, but also consumers who have simply never called in. Consumers slammed in this way would have difficulty proving that they had never initiated calls to a carrier. We find that the commenters who opposed verification of in-bound calls failed to offer any solutions to the problem that no record is created during an in-bound call that can adequately demonstrate both that the subscriber called in and that the call was for the purposes of authorizing a carrier change.[205]

64. Furthermore, we find that exempting in-bound calls from the verification requirements would undermine the policy underlying section 258, which we conclude was intended to provide protection for all changes to a subscriber's telecommunications service, regardless of the manner of solicitation.[206] We also disagree with the arguments of some commenters who claim that customers will become frustrated if their in-bound carrier change requests are verified.[207] Slamming has been a much publicized issue and we receive many calls and letters and complaints on a daily basis from consumers regarding slamming. We believe that consumers will welcome additional efforts to combat slamming from all of its

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202 *See, e.g.*, BCI Comments at 6; NAAG Comments at 9; Ohio Commission Comments at 9; MCI Comments at 2. AT&T was originally opposed to verification of in-bound calls in its comments. *See* AT&T Comments at 21. Subsequently, AT&T announced its intention to require third party verification of all telemarketing sales, including those generated by in-bound calls. *See, e.g.*, John J. Keller, *Inside AT&T, A Crackdown on 'Slamming,'* Wall St. J., Mar. 3, 1998, at B1. TRA states that excluding in-bound calls from the verification requirements would favor large carriers over small carriers because large carriers are able to launch marketing campaigns in order to encourage consumers to call in to change their service. TRA Comments at 10-11.

203 *See, e.g.*, Intermedia Comments at 5; Telco Comments at 6. In fact, the Florida Commission reports that it has received complaints about slams resulting from in-bound calls. Florida Commission Comments at 3.

204 *See, e.g.*, NYSCPB Reply Comments at 8; TOPC Reply Comments at 3; TW Comm. Comments at 7.

205 The Florida Commission states in its comments that when questioned, carriers accused of in-bound call slamming stated that their records indicated nothing but that the consumer had requested a change. *See* Florida Commission Comments at 4.

206 *See, e.g.*, Intermedia Comments at 5; NYSCPB Comments at 21.

207 *See, e.g.*, BellSouth Comments at ii; USTA Comments at 5.

sources.

65. Several commenters state that slamming from in-bound calls currently is not a significant problem.[208] We conclude, however, that consumers who call carriers are just as vulnerable to being slammed as consumers who are called by carriers and are entitled to the same protection under section 258.[209] We further conclude that, with the imposition of the more stringent verification rules that we are adopting in this *Order*, unscrupulous carriers will attempt to devise other schemes to make unauthorized carrier changes. If in-bound calls were not required to be verified, they would become an easy opportunity for slamming carriers to take advantage of consumers. For example, a carrier may advertise a sweepstakes for which a consumer must call a certain number to register for the drawing. The carrier could use this in-bound call to slam consumers, who would not have the benefit of subsequent verification to prevent themselves from being slammed. Our experiences with slamming carriers demonstrate the vital importance of foreclosing potential sources of fraud *before* they become a major subject of consumer complaints. In addition, we conclude that slamming using in-bound calling will become even more prevalent when carriers begin to combine services to market to consumers, *e.g.*, combining intraLATA and interLATA toll services together. For example, if a consumer calls an unscrupulous carrier to order interLATA toll service, that carrier could make an unauthorized change to the consumer's intraLATA toll service as well. By imposing verification requirements on sales made from in-bound calls, we take an aggressive approach to combating slamming before it occurs. The magnitude of the slamming problem reveals that the Commission cannot simply wait for problems to appear before attempting to fix them. The Commission must take a pro-active approach to slamming and foreclose opportunities for slamming before unscrupulous carriers use them.

66. Our verification rules will apply to all carriers who receive calls that result in the submission of a carrier change request on a subscriber's behalf. We decline to apply our verification requirements only to certain carriers, based on their ILEC status or the fact that they conduct contests or sweepstakes, as suggested by some commenters.[210] All calls that generate the submission of a carrier change on a subscriber's behalf, regardless of the carrier receiving it or how the request was received, must be verified. This uniform rule will ease administration by eliminating any possible confusion or disputes regarding the applicability of call verification. We agree, for example, with U S WEST that if verification of in-bound calls is applied only to carriers using contests or sweepstakes, it may be difficult to determine

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[208] *See, e.g.*, BellSouth Comments at 11; SDN Comments at 2.

[209] *See* Informal Complaint of Kathleen M. Simpson, IC # 98-04051 (alleging that her long distance service was switched without her authorization when she called the carrier's 800-number to ask it to stop mailing her promotional material).

[210] *See, e.g.*, BIC Comments 5-6; CompTel Comments at 10; WorldCom Comments at 8; Working Assets Comments at 6.

whether any particular promotional campaign is a contest or sweepstakes.[211] We also find that uniform application of the verification requirements to all in-bound and out-bound calls will decrease consumer confusion about what to expect when making changes to their telecommunications services. We note that several commenters appear to believe that verification would be required only of calls made to a carrier's sales department or only for purposes of inquiry concerning a possible change request.[212] We clarify that the in-bound call verification requirement applies to *any* call made to a carrier that results in a carrier change request being submitted on behalf of a subscriber.[213] In this way, our verification rules will protect those consumers who may call a carrier for reasons other than to change service, but end up having their service changed.

67. We apply the same verification requirements to in-bound and out-bound calls. This will enable carriers to adopt uniform verification procedures for all calls. We conclude that the verification rules for out-bound calls will sufficiently protect consumers from in-bound call slamming. We note that several commenters propose that less burdensome verification procedures apply to in-bound telemarketing. ACTA and RCN, for example, suggest that the telemarketer be permitted to confirm the order verbally, just as a mail order telemarketer would.[214] BellSouth, GTE, IXC Long Distance, and TOPC propose to allow carriers to make audio recordings of inbound calls.[215] We decline to adopt these proposals because we find that they offer little protection to a consumer against an unscrupulous carrier. We have previously rejected in-house verification procedures as providing carriers with too much incentive and opportunity to commit fraud.[216] Because we conclude that consumers deserve the same protection from in-bound call slamming as they do from out-bound call slamming, we cannot permit carriers to use less secure procedures to verify sales generated from in-bound calls. Furthermore, we find that our rules provide a carrier with sufficient flexibility to choose a verification method that is appropriate for that carrier.

68. U S WEST included in its comments a Petition for Reconsideration of that portion of the *1995 Report and Order* that applied the Commission's verification rules to in-

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[211] U S WEST Reply Comments at 18 n.50.

[212] For example, NYSCPB argues that the verification requirements should apply not just to calls to sales or marketing centers but to all calls on which sales or marketing activities occur. NYSCPB Comments at 22. We agree.

[213] *See 1995 Report and Order*, 10 FCC Rcd 9560; *see also* 47 U.S.C. § 258(a).

[214] ACTA Comments at 27; RCN Comments at 5.

[215] BellSouth Comments at 11; GTE Comments at 10-11; IXC Long Distance Comments at 3; TOPC Reply Comments at 4.

[216] *See PIC Verification Order*, 7 FCC Rcd at 1041.

bound calls.[217] U S WEST states that because the *1995 Report and Order* pertained only to interexchange services and IXCs, a LEC such as U S WEST would not have been expected to seek reconsideration of those rules at that time.[218] We find that U S WEST's Petition for Reconsideration of the Commission's *1995 Report and Order* is untimely filed.[219] Nevertheless, in making our decision regarding in-bound verification in this *Order*, we have taken into consideration the comments regarding in-bound verification submitted by U S WEST in its Petition for Reconsideration. Based on the evidence in the record, the additional comments sought and received, and the anticipated competitive climate, we conclude that imposing verification rules on in-bound calls is in the public interest and that U S WEST's request to the contrary should be denied. We note additionally that we have concluded earlier in this *Order* that, in accordance with the mandate of section 258, the Commission's verification rules apply to all telecommunications carriers that submit or execute carrier changes, including LECs.[220]

3. Independent Third Party Verification

69. Several commenters submitted proposals regarding the independent third party verification method in response to the Commission's request in the *Further Notice and Order* for additional mechanisms for reducing slamming.[221] Based on some of these proposals, and also to address some of the problems we have seen in conjunction with the use of this verification method, we modify our rules to set forth explicit criteria to meet the requirement of independence for an independent third party verifier. We also seek comment on additional modifications to our rules regarding independent third party verification in our Further Notice of Proposed Rulemaking.[222]

70. Our existing rules provide for verification by using an "appropriately qualified and independent third party operating in a location physically separate from the telemarketing representative" who obtained the carrier change request.[223] When we adopted independent

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[217] *See* U S WEST Comments at 33.

[218] U S WEST Comments at 33, n.76.

[219] 47 C.F.R. § 1.429(d).

[220] We note, however, that we exclude CMRS carriers from compliance with our verification requirements. *See supra* discussion on Application of the Verification Rules to All Telecommunications Carriers.

[221] *Further Notice and Order*, 12 FCC Rcd at 10694. *See, e.g.*, MCI Comments at 21; TPV Services Comments at 7.

[222] *See infra* Further Notice of Proposed Rulemaking, Independent Third Party Verification.

[223] *See* 47 C.F.R. § 64.1100(c)(3).

third party verification as a verification option in the *PIC-Verification Order*, we stated that this verification procedure should create evidence that is "totally independent of the IXC's marketing operations."[224] We have seen many instances in which carriers use third party verification in a manner that is calculated to confuse and mislead consumers. These carriers slam consumers by first using misleading telemarketing to induce consumers to change carriers, for example, by telling them that their local and long distance bills will be consolidated. Then third party verifiers close the deal for these slamming carriers by assuring the consumers that they have merely authorized billing consolidation, not any carrier changes.[225] We emphasize that our existing rules mandate that a third party verification must be truly independent of both the carrier and the telemarketer in order to constitute a valid verification. In particular, a third party verifier that has any incentive, financial or otherwise, to approve a carrier switch would violate our rules and such verification would not serve as evidence to rebut a subscriber's allegation of an unauthorized switch.

71. We set forth the following specific criteria to determine a third party verifier's independence. These criteria are not intended to be exhaustive, but rather the Commission will evaluate the particular circumstances of each case. First, the third party verifier should not be owned, managed, controlled, or directed by the carrier.[226] Ownership by the carrier would give the third party verifier incentive to affirm carrier changes, rather than to determine whether the consumer has given authorization for a carrier change. Second, the third party verifier should not be given financial incentives to approve carrier changes.[227] For example, an independent third party verifier should not receive commissions for telemarketing sales that are confirmed because such a compensation scheme provides the third party verifier with incentive to falsely confirm sales. As another example, a carrier should not require an independent third party verifier to agree to an exclusive contract with the carrier, such that the independent verifier is wholly dependent on that particular carrier for revenue. Third, we reiterate that the third party verifier must operate in a location physically separate from the carrier. We note that our rules already require this, but we highlight this requirement because we find it to be an important one.[228] Requiring third party verifiers to be in different physical locations from carriers reinforces the arms-length nature of their relationship.

72. Several commenters also propose disclosure requirements for the scripts used by third party verifiers. NAAG, for example, suggests that third party verification should

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[224] *PIC Verification Order*, 7 FCC Rcd at 1045.

[225] *See, e.g., Business Discount Plan, Inc.*, Notice of Apparent Liability for Forfeiture, ¶¶ 13-15, ENF-98-02, NAL/Acct. No. 916EF0004, FCC 98-332 (Dec. 17, 1998) (*BDP NAL*).

[226] *See* MCI Comments at 21; *see also* TPV Services Comments at 7.

[227] *See* MCI Comments at 21; *see also* TPV Services Comments at 7.

[228] 47 C.F.R. § 64.1100(c).

include the disclosure of all material information, such as the information disclosures required for written LOAs.[229] TPV Services also states that the verifier should only confirm that the subscriber understands the transaction and should refrain from telemarketing for the carrier.[230] Based on the record, we conclude that the scripts used by the independent third party verifier should clearly and conspicuously confirm that the subscriber has previously authorized a carrier change. The script should not mirror any carrier's particular marketing pitch, nor should it market the carrier's services. Instead, it should clearly verify the subscriber's decision to change carriers. We note that we seek additional comment on proposals for script requirements in the Further Notice of Proposed Rulemaking.[231]

4. Other Verification Mechanisms

73. The Commission sought comment in the *Further Notice and Order* on additional mechanisms for reducing slamming.[232] We received multiple proposals and have evaluated them accordingly. We adopt a proposal made by certain commenters to require a retention period for proof of verification and decline to adopt several other proposals made by commenters. We also highlight or clarify certain aspects of our verification rules, including the application of our verification rules to all carrier changes, and our LOA requirements.

74. We adopt a rule requiring carriers to retain LOAs and other verification records for two years.[233] Previously, we required LOAs to be retained for one year[234] and we did not impose any retention period for other methods of verification. NAAG suggests that carriers be required to retain LOAs and verification records for three years.[235] We conclude that requiring carriers to retain verification records for greater than two years would be an unnecessary burden for carriers and instead will require verification records to be retained for a period of two years. We choose a retention period of two years because any person desiring to file a complaint with the Commission alleging a violation of the Act must do so within two years of the alleged violation.[236] A two-year retention period will enable carriers to produce

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[229] NAAG Comments at 17. *See also* 47 C.F.R. § 64.1150.

[230] TPV Services Reply Comments at 6.

[231] *See infra* Further Notice of Proposed Rulemaking, Independent Third Party Verification.

[232] *Further Notice and Order*, 12 FCC Rcd at 10694.

[233] *See* Appendix A, § 64.1100(a)(1).

[234] *Allocation Order*, 101 FCC 2d. 911, 930 (1985).

[235] NAAG Comments at 8.

[236] *See* 47 U.S.C. § 415.

documentation to support their claims regarding an alleged unauthorized change. Any carrier who is unable to provide evidence of verification during this period will be subject to a rebuttable presumption in any action before the Commission that the carrier has failed to obtain authorization before making a carrier change.

75. Other commenters make other suggestions that, although they might be helpful in preventing slamming, are impractical to implement. For example, NCL suggests that all subscribers be assigned a personal identification number (PIN) by their interexchange carriers to use when authorizing carrier changes.[237] We conclude that, at this time, such proposal would be impractical. Allowing one party, the IXC, to control confirmation of PIN numbers could deter competition. Furthermore, because such PINs would be infrequently used, most subscribers would probably forget their PINs, resulting in considerable inconvenience to them.

76. Several commenters suggest limiting our verification options to only written LOAs[238] or to independent third party verification,[239] while others propose to add more options, such as audio recording.[240] Many commenters object to any proposals that would limit the verification options available, arguing that carriers should be granted flexibility in their verification procedures.[241] We decline to further limit the verification options. A range of verification options - written LOA, electronic authorization, and independent third party verification[242] - is necessary to continue to give carriers the maximum flexibility to choose a verification method appropriate for their needs. Furthermore, the verification rules, as we have modified them in this *Order* will provide consumers with protection against slamming while still providing them with the ability to change carriers without unnecessary burdens.

77. Some commenters propose that the Commission adopt regulations to prohibit directly deceptive or abusive sales tactics.[243] NAAG states that some carriers claim that Federal Trade Commission regulations prohibiting deceptive sales practices do not apply to common carriers.[244] FLS states that some carriers claim that state consumer protection laws

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[237] NCL Comments at 7.

[238] *See, e.g.*, Virginia Commission Comments at 5; FLS Comments at 2.

[239] *See, e.g.*, MCI Comments at 4; California Commission Comments at 7.

[240] *See, e.g.*, Ameritech *ex parte* presentation of June 16, 1998; Virginia Commission Comments at 5; U S WEST Reply Comments at 19.

[241] *See, e.g.*, SNET Reply Comments at 9.

[242] *See* Appendix A, § 64.1150.

[243] *See, e.g.*, NAAG Comments at 14-15; FLS Comments at 3.

[244] NAAG Comments at 14-15.

do not apply to common carriers.[245] We decline to adopt any specific regulations at this time. We note that the Commission has authority under section 201(b) to prohibit all carrier practices that are unjust and unreasonable,[246] including deceptive or abusive sales tactics. For example, recently we took enforcement action against a carrier because its fraudulent representation of itself as a billing consolidation service, rather than as an interexchange carrier, as well as its efforts to obscure the true nature of its service offering, appeared to constitute unjust and unreasonable practices in violation of Section 201(b).[247]

78. We clarify that, regardless of the solicitation method used, all carrier changes must be verified. We modify our rules to make clear that a carrier must use of one of our three verification options (written LOA, electronic authorization, and independent third party verification) to verify any carrier change. Specifically, the current rules appear to create a dichotomy between verification methods to be used when a carrier change is obtained through telemarketing, and when other marketing methods are used. A strict reading of the rules would indicate that, pursuant to current section 64.1100, a telemarketing carrier has several verification options, but that a carrier that does not telemarket must obtain a written LOA pursuant to current section 64.1150. This would seem to penalize carriers that use methods other than telemarketing, such as in-person solicitations or Internet sign ups,[248] by denying them flexibility in their verification methods. We are also aware that some carriers have interpreted the difference between current sections 64.1100 and 64.1150 to argue that they are not required to verify their carrier change requests because such changes were not obtained through telemarketing. This is incorrect, as the Commission's previous orders have clearly stated that *all* carrier changes must be authorized and verified.[249] Because some confusion appears to exist among carriers regarding this subject, we modify our rules accordingly.

79. With regard to LOAs, we have seen a disturbing trend in the practices of certain carriers and their agents of marketing telecommunications services in conjunction with sweepstakes and contests at events such as fairs and other public gatherings. Such carriers encourage people to fill out and sign contest forms that also contain LOA language printed in an inconspicuous manner, and to drop the forms into a box in order to win a prize that will

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[245] FLS Comments at 3.

[246] *See* 47 U.S.C. § 201(b).

[247] *BDP NAL* at ¶ 29.

[248] *See infra* discussion on Carrier Changes using the Internet.

[249] *See, e.g., Allocation Order*, 101 FCC 2d at 929; *PIC Verification Order*, 7 FCC Rcd at 1038. We note that the Commission had stayed the application of our verification rules to in-bound calls. *See In-Bound Stay Order*.

be awarded on the basis of an entry drawn from the box.[250] Such practices are in violation of the Commission's rules. Our rules state that the LOA "shall be a separate document . . . whose *sole* purpose is to authorize an interexchange carrier to initiate a primary interexchange carrier change."[251] In situations such as the one we have described, the LOA is not being used for the sole purpose of authorizing a change in carriers. The LOA is being used for two purposes - to change a subscriber's long distance service and to enter a contest or sweepstakes. We adopted this rule specifically to address the situation in which a consumer is "deceived by an LOA that is disguised as a contest entry, prize claim form, or charitable solicitation."[252] We emphasize that carriers who utilize such practices are violating the Commission's rules and may be subject to the full range of sanctions at the Commission's disposal, including forfeitures and revocation proceedings.[253]

5. Use of the Term "Subscriber"

80. We modify current section 64.1100 to use the term "subscriber" in place of "customer," as proposed in the *Further Notice and Order*.[254] We also amend current section 64.1150(e)(4) to change the word "consumer" to "subscriber."[255] Because section 258 uses the term "subscriber" rather than "customer," this will make the language in our rules consistent

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250 *See, e.g.*, Informal Complaint of Federal Flange, IC 97-0826161027; Informal Complaint of Gregory G. Bentz, CPA, IC 97-0812114300.

251 47 C.F.R. § 64.1150(b), emphasis added. There is an exception to this rule for check LOAs. *See* 47 C.F.R. § 64.1150(d). Furthermore, in certain circumstances, we would consider an LOA's inclusion of information about the terms of service to which the subscriber is agreeing to change as not inconsistent with the requirement that the LOA's "sole purpose" be to authorize a change in carriers. *See Further Notice and Order*, 12 FCC Rcd at 10707 (stating that, to the extent that a telecommunications services contract authorizes a change in business or residential service, that contract must also be consistent with our LOA requirements).

252 *1995 Report and Order*, 10 FCC Rcd at 9572.

253 *See* 47 U.S.C. §§ 214, 503(b).

254 *See* Appendix A, § 64.1150. We note that, although throughout the text of this *Order* we use the terms "subscriber," "consumer," and "customer," the applicable term for the rules is "subscriber."

255 *See* Appendix A, § 64.1160(e)(4). We note that we inadvertently failed to propose this specific word change in the *Further Notice and Order*. *Further Notice and Order*, 12 FCC Rcd at 10683. Our rationale, however, for using the term "subscriber" in current sections 64.1100 and 64.1150 is the same. Although we did not provide notice prior to making this amendment, we conclude that the substitution of terms is a minor, non-substantive change for which notice is not necessary. *See* 47 C.F.R. § 1.412(c) (stating that rule changes may be adopted without prior notice if the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest).

with the statutory language.[256]

D. Extension of the Commission's Verification Rules to the Local Market

1. Application of the Verification Rules to the Local Market

81. In the *Further Notice and Order*, the Commission sought comment on whether the current verification rules, which apply only to IXCs, should be applied to the local market (*i.e.*, local exchange service and intraLATA toll service).[257] We conclude that Congress has expressed its intent in section 258 to have the Commission adopt verification rules applicable to changes in both local exchange and telephone toll service.[258] Accordingly, all changes to a subscriber's preferred carrier, including local exchange, intraLATA toll, and interLATA toll services, must be authorized by that subscriber and verified in accordance with our procedures.[259] The slamming complaints we have received thus far are almost exclusively complaints about unauthorized changes in interexchange carriers. With the advent of competition in the provision of local exchange and intraLATA toll services, however, we anticipate an even greater incidence of slamming generally if effective rules are not put into place. State commissions are already receiving complaints concerning local service slamming.[260] The Commission processed approximately 80 complaints regarding local service slamming in 1997 and 129 local service slamming complaints from January through October

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[256] In the Further Notice of Proposed Rulemaking, we include proposals on how a "subscriber" should be defined. *See infra* discussion in Further Notice of Proposed Rulemaking, Definition of "Subscriber."

[257] *Further Notice and Order*, 12 FCC Rcd at 10682.

[258] Section 258 makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." 47 U.S.C. § 258.

[259] *See* Appendix A, §§ 64.1100, 64.1150, 64.1160. We note that changing a subscriber's local exchange carrier may be a very different transaction from changing a subscriber's interexchange carrier. For example, changes to interexchange service are executed by making a software change at the switch of the facilities-based local exchange carrier. Changes to local exchange service, however, do not involve software changes in the switch. For example, if a subscriber changes from a facilities-based incumbent local exchange carrier to a competitive LEC who is reselling the facilities-based carrier's local exchange service, the reseller competitive LEC would submit the change request to the facilities-based local exchange carrier, who would simply change the billing information for that subscriber. The facilities-based carrier does not make a software change at the switch because its facilities are still used to provide local exchange service to that subscriber, albeit through a reseller. We conclude that our verification rules provide sufficient protection for subscribers, regardless of the services changed.

[260] For example, the Florida Commission reports that it received 27 complaints concerning local slamming in the first seven months of 1997. Florida Commission Comments at 2.

1998.[261] We agree with the majority of commenters that the current rules, with the modifications adopted in this *Order*,[262] should be effective in preventing slamming in the local market.[263]

82. We also require carriers to identify specifically the types of service or services being offered (*e.g.*, interLATA toll, intraLATA toll, local exchange) in any preferred carrier solicitation or letter of agency, and to obtain separate authorization and verification for each service that is being changed.[264] The separate authorization and verification may be received and conducted during the same telemarketing solicitation or obtained in separate statements on the same LOA form. We merely require that each service be identified and delineated clearly to the subscriber. For example, a carrier that calls a subscriber to market both intraLATA toll and interLATA toll services must explain to the subscriber the difference between the two services. Then the carrier must obtain separate authorization for each service. The subscriber's authorizations to change intraLATA toll and interLATA carriers must also be verified separately. We adopt this rule in response to the concerns of carriers such as Ameritech and CBT that consumers may experience considerable confusion about the differences among telecommunications services, especially the distinction between intraLATA toll and interLATA toll.[265] By requiring carriers to describe fully the services they offer, and obtain separate authorization and verification for different services, carriers will be prevented from taking advantage of consumer confusion and changing the preferred carriers for all of a subscriber's telecommunications services where the subscriber merely intended to change one. We note that this rule builds on the existing requirement in section 64.1150(e)(4) of our rules that an LOA must contain separate statements regarding the subscriber's choice of interexchange carriers where a jurisdiction allows the selection of additional primary interexchange carriers (*e.g.*, for intrastate toll or international calling).[266] Our decision today

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[261] Common Carrier Bureau, Enforcement Division, Consumer Protection Branch Databases Tracking Consumer Complaints (Oct. 1998).

[262] *See, e.g., infra* discussion on The Welcome Package (eliminating the welcome package as a verification method for carrier changes generated through telemarketing).

[263] *See, e.g.*, AT&T Comments at 1; Bell Atlantic Comments at 10; NAAG Comments at 9.

[264] *See* Appendix A, §§ 64.1100(b), 64.1160(e)(4). Additionally, if a carrier were to use customer proprietary network information (CPNI) for marketing, such carrier would have to comply with section 222 requirements. *See* 47 U.S.C. § 222; *see also Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*).

[265] *See* Ameritech Comments at 10; CBT Comments at 3-4.

[266] 47 C.F.R. § 64.1150(e)(4).

expands the requirement of section 64.1150(e)(4) to encompass all telephone exchange and telephone toll services and establishes the same requirement for the verification of all carrier changes.

83. The verification rules are intended to deter slamming and protect consumers from unauthorized changes in their preferred carriers. Several commenters, however, support targeted proposals, rather than the general application of more rigorous verification rules, purportedly to avoid unnecessary costs and harm to competition.[267] For example, Ameritech, SBC, and U S WEST propose systems that would impose fines or more stringent verification requirements on carriers with a history of slamming, as determined by the LEC or otherwise.[268] In light of the high incidence of slamming violations we currently face, we prefer to adopt the approach taken in the rules in this *Order* because they will help to prevent carriers from slamming consumers in the first place. Furthermore, such proposals could permit LECs to target certain carriers, including those that are offering competing services. Considering that LECs may no longer be neutral parties in the carrier change process as a result of their entry or expected entry into the in-region long distance market and the advent of local competition, we do not believe that it would be prudent to provide LECs with incentive to act anti-competitively. We note that Ameritech states that, rather than permitting LECs to determine which carriers should be subject to fines or more stringent verification requirements, carriers could be targeted using a more neutral source of numbers of carrier change disputes, such as the Commission's Common Carrier Scorecard, which shows the number of disputed carrier changes for carriers.[269] We share TRA's concern, however, about imposing disparate treatment before a carrier has the opportunity to prove that it did not slam a consumer.[270]

2. Application of the Verification Rules to All Telecommunications Carriers

84. In the *Further Notice and Order*, the Commission proposed to incorporate the specific language of section 258(a) of the Act into its rules to reflect the statutory prohibition

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[267] *See, e.g.*, TRA Comments at 2; RCN Comments at 5.

[268] *See* Ameritech Comments at 12; SBC Comments at 4-5; U S WEST Comments at 20. Under SBC's "3 strikes and you're out" approach, Strike 1 would occur if a carrier's disputed change orders exceeded 2% of its service orders in one month. The carrier would be placed on probation. Strike 2 would occur if the dispute level continued to exceed 2% of its service orders in one month at the end of the probation period. That carrier would then be subjected to a fine of at least $5,000 per slamming occurrence. Strike 3 would occur if the dispute level continued to exceed 2% of its service orders in one month. The carrier would then be subject to $10,000 fines, as well as possible suspension of carrier-change privileges. SBC Comments at 5.

[269] *See* Ameritech Comments at 12.

[270] *See* TRA Reply Comments at 9-11.

on slamming by any telecommunications carrier, and not just IXCs as is the case under the current rules.[271] We adopt the proposed rule requiring that no telecommunications carrier shall submit or execute a change on behalf of a subscriber in the subscriber's selection of a provider of telecommunications service except in accordance with the Commission's verification procedures, consistent with the language of section 258.[272] We note that the Commission's verification procedures would not apply to a situation in which a carrier drops a subscriber from its service, resulting in the subscriber not having any presubscribed carrier, because such a change would not result in the subscriber being presubscribed to another carrier. The commenters support our finding that incorporating the broad language of section 258 into our rule will appropriately implement Congressional intent.[273]

85. Based on the record, however, we create an exception for CMRS providers.[274] We conclude that CMRS providers should not be subject to our verification rules at this time because slamming does not occur in the present CMRS market.[275] CMRS providers are not currently subject to equal access requirements.[276] In other words, a CMRS provider is free to designate any toll carrier for its subscribers unless it has voluntarily chosen not to do so. We believe that many CMRS providers offer their subscribers telecommunications service packages that include local exchange, intraLATA toll, and interLATA toll services using particular carriers, and therefore any consumer who has agreed to subscribe to such a package as offered by a CMRS provider may have agreed to use only those carriers.[277] Where a CMRS provider does not offer its subscribers any choices in toll carriers, verification of subscriber authorization to change toll providers would be inapplicable. We are aware, however, that some CMRS providers do provide their subscribers with choices in toll carriers.

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271 *Id.*

272 *See* Appendix A, §§ 64.1100, 64.1150, 64.1160.

273 *See, e.g.*, BCI Comments at 9; PaOCA Comments at 4; USTA Comments at 2.

274 *See* Appendix A, § 64.1100(a)(3). *See also, e.g.*, Air Touch Comments at 2; BellSouth Reply Comments at 7; 360o Comments at 7.

275 *See* Appendix A, § 64.1100(a)(3).

276 Section 332(c)(8) of the Act states that CMRS providers "shall not be required to provide equal access to common carriers for the provision of telephone toll services." 47 U.S.C. § 332(c)(8). *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Order, 11 FCC Rcd 12456 (1996).

277 Because CMRS carriers compete with each other to provide the lowest overall rates for their subscribers, they presumably attempt to obtain the lowest rates for toll services from intraLATA toll and interLATA toll carriers. We anticipate that once wireline local competition is established, wireline carriers will also begin to offer telecommunications packages offering local exchange, intraLATA toll and interLATA toll services.

It is our understanding that the CMRS carrier, which has made contractual arrangements with the toll carriers, is in control of this selection process and must be contacted by the subscriber in order for any change in toll carriers to occur. Furthermore, Bell Atlantic Mobile and CTIA state that, at this time, a CMRS carrier cannot change a customer's wireless local exchange service without that customer's express approval, because the customer must typically physically reprogram the handset to initiate service with a new carrier.[278] In light of these considerations, we believe that unauthorized changes are much less likely to occur and we are not aware of any slamming complaints in this area.[279] Accordingly, in the absence of evidence that slamming is a problem in this area, we decline to apply our verification procedures to CMRS carriers at this time.[280] We may revisit this issue should slamming become a problem in the CMRS market.

3. The States' Role

86. Section 258 charges the Commission with the responsibility for establishing verification procedures for carriers who "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service."[281] Therefore, section 258 explicitly grants the Commission authority to create verification procedures for both interstate and intrastate services, and our rules here indeed apply to both sets of services. Many carriers urge us generally to preempt state regulation of slamming by local exchange and intrastate interexchange carriers in order to create uniform rules.[282] Carriers such as AT&T, BellSouth, and Excel state that compliance with multiple sets of federal and state rules would be expensive, delay competition, and confuse consumers.[283] The issue of federal preemption of slamming regulation by states has also been raised in other fora.[284]

87. We decline to preempt generally state regulation of carrier changes. The states and the Commission have a long history of working together to combat slamming, and we conclude that state involvement is of greater importance than ever before. We conclude that

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278 Bell Atlantic Mobile Comments at 4; CTIA Reply Comments at 3-4.

279 If a CMRS provider, however, changes a subscriber's toll carrier without authorization after contractually agreeing not to take such actions, such CMRS carrier could be acting unreasonably in violation of section 201(b). *See* 47 U.S.C. § 201(b).

280 *See* Appendix A, § 64.1100(a)(3).

281 47 U.S.C. § 258(a).

282 *See, e.g.*, BellSouth Comments at 3; Working Assets Comments at 2.

283 AT&T Comments at 38; BellSouth Comments at 3; Excel Comments at 3.

284 *See, e.g., Minnesota v. Minimum Rate Pricing, Inc. and Thomas N. Salzano*, No. C1-97-008435 (Minn. Apr. 13, 1998) (stating that section 258 of the Communications Act preempts state slamming rules).

the Commission must work hand-in-hand with the states for the common purpose of eliminating slamming. In the context of this partnership, we expect the states and the Commission to continue sharing information about slamming and to develop together new and creative solutions to combat slamming. We conclude that, although a state must accept the same verification procedures as prescribed by the Commission, a state may accept additional verification procedures for changes to intrastate service if such state concludes that such action is necessary based on its local experiences.

88. In other words, absent a specific preemption determination, a state may provide carriers with further options for verifying carrier changes to intrastate service, in addition to the Commission's three verification options, if the state feels that such procedures would promote consumer protection and/or competition in that state's particular region. In this regard, we agree with the Maryland Commission, which contends that states may have valuable insight because they have substantial contact with consumers and are near to the slamming problem.[285] We agree with the Oklahoma Commission, which states that a "one-size-fits-all approach," as recommended by the carriers, would not take into consideration the specific experiences and concerns of individual states in the slamming area.[286] We further note that nothing in our rules prohibits states from deterring slamming through means other than regulation of verification procedures, such as general consumer protection requirements or direct regulation of telemarketing sales.[287]

89. States must, however, write and interpret their statutes and regulations in a manner that is consistent with our rules and orders, as well as section 258. For example, a state may not adopt the welcome package as an additional verification method because we have determined that the welcome package fails to protect consumers. Furthermore, we are obligated and willing to examine state rules on a case-by-case basis if it appears that they conflict with the purpose of our rules, for instance, by prohibiting or having the effect of prohibiting the ability of any entity to provide telecommunications service.[288] With regard to the issue of preemption of state verification procedures, the Commission will not make a preemption determination in the absence of an adequate record clearly describing the state law or action to be preempted and precisely how that state law or action conflicts with federal law

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[285] Maryland Commission Comments at 3.

[286] Oklahoma Commission Reply Comments at 3.

[287] *See, e.g.*, Letter from Lawrence E. Strickling, Federal Communications Commission to David J. Gilles, Assistant Attorney General, State of Wisconsin (Aug. 12, 1998) (stating that the Commission's rules and the Communications Act of 1934, as amended do not preempt Wisconsin laws and rules that regulate telemarketing sales and home solicitation sales).

[288] *See* 47 U.S.C. § 253(a) (providing that, subject to certain exceptions, no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service).

or obstructs federal objectives.[289] The record in this proceeding does not contain any comprehensive identification or analysis of which particular state laws would be inconsistent with our verification rules or would obstruct federal objectives. Some commenters reference state laws that differ from the Commission's rules, such as California's law that requires carriers to use third party verification for changes to residential service.[290] These commenters, however, do not ask for preemption of these specific statutes alone, but rather for wholesale preemption of all state statutes that may be inconsistent with the Commission's verification requirements.[291] The commenters do not provide any detailed explanation of how a particular state's verification requirements differ from those of the Commission, nor how any state requirements are inconsistent with our rules or obstruct federal objectives. The commenters merely allege generally that carriers will find it easier to comply with one uniform set of federal rules rather than with federal rules and multiple sets of state rules.[292] Accordingly, the record does not contain sufficient information about various state requirements to allow us to assess the ability of carriers to comply with both federal and state anti-slamming mechanisms. To the extent, however, that these laws require a verification procedure that is acceptable under our rules, they would appear to be in compliance with section 258 and would not be preempted.

90. Section 258 expressly grants to the states authority to enforce the Commission's verification procedure rules with respect to intrastate services.[293] A state therefore may commence proceedings against a carrier for violation of the Commission's rules governing changes to a subscriber's intrastate service. We conclude that enforcement is another area in which the states and the Commission may work together to eradicate slamming. A single unauthorized change may result in the switching of both a subscriber's intrastate and interstate service in violation of the Commission's verification procedures. In the case of an unauthorized change that results in changes to intrastate and interstate service, a state's

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289 *See, e.g., Motion for Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulations as Applied to Cellular Carriers*, Memorandum Opinion and Order, 12 FCC Rcd 13987, 13,991 (1997). *Cf. California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14191 (1997) (Commission denied petition for preemption under section 253 because petitioner failed to present sufficient record demonstrating barrier to entry); *TCI Cablevision of Oakland County, Inc.*, 9 Comm. Reg. (P&F) 730 (1997) (petitioner seeking preemption under section 253 bears burden of proof to demonstrate that it is entitled to such relief).

290 *See, e.g.*, AT&T Comments at 36-37, n.51.

291 *See, e.g.*, ACTA Comments at 19; AT&T Comments at 37; RCN Comments at 3; Sprint Reply at 9; Winstar Comments at 9.

292 *See, e.g.*, ACTA Comments at 23; IXC Long Distance Reply at 7; SDN Comments at 2.

293 *See* 47 U.S.C. § 258(a).

proceeding to enforce the Commission's rules with respect to the intrastate violation will yield factual findings regarding the interstate violation as well. The state's factual finding in such a case will be given great weight in the Commission's proceeding to determine whether the carrier violated the Commission's interstate verification procedures. This will help to deter slamming by expediting the resolution of slamming complaints on a nationwide basis. We conclude that state regulation of carrier changes in the intrastate market that is compatible with our rules, along with state enforcement of our rules regarding carrier changes in the intrastate market, will enable states to play a valuable and essential role in the partnership with the Commission to combat slamming and protect consumers.

E. Submitting and Executing Carriers

1. Definition of "Submitting" and "Executing" Carriers

91. In the *Further Notice and Order*, the Commission tentatively concluded that a submitting carrier is any carrier that requests that a consumer's telecommunications carrier be changed, and that an executing carrier is any carrier that effects such a request.[294] The Commission sought comment on these definitions, and on whether they were sufficiently broad in scope to hold accountable all carriers involved in carrier change transactions.[295]

92. We adopt a modification to our proposed definition of a submitting carrier in order to take into account the roles of underlying carriers and their resellers. Many commenters, including Bell Atlantic, Frontier, the North Carolina Commission, and Sprint, note that our proposed definitions did not take into account the role shifting that occurs when a facilities-based LEC or IXC sells service to a switchless reseller.[296] For example, the reseller that generates carrier changes for interexchange service generally submits the change requests to the facilities-based IXC from which it purchases service. The facilities-based IXC then submits the change requests to the executing LEC. These commenters generally support redefining a submitting carrier so that the reseller, rather than its underlying facilities-based carrier, would have the obligations of being the submitting carrier.[297] The rules we adopt build on suggestions made by WorldCom for defining a submitting carrier.[298] Under the rules we adopt, a submitting carrier will be generally any carrier that (1) requests on the behalf of a

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[294] *Further Notice and Order*, 12 FCC Rcd at 10683.

[295] *Id.*

[296] *See, e.g.*, Bell Atlantic Comments at 8; Frontier Comments at 17; North Carolina Commission Comments at 4; and Sprint Comments at 26 n.20.

[297] *See e.g.*, Frontier Comments at 19; IXC Long Distance Reply Comments 10; and Sprint Comments at 26 n.20.

[298] *See* WorldCom Comments at 4.

subscriber that the subscriber's telecommunications carrier be changed; and (2) seeks to provide retail services to the end user subscriber.[299] We note, however, that either the reseller or the facilities-based carrier may be treated as a submitting carrier if it is responsible for any unreasonable delays in the submission of carrier change requests or if it is responsible for submitting unauthorized carrier change requests, including fraudulent authorizations. If, for example, a reseller submits a carrier change request to its underlying carrier, and that underlying carrier changes that carrier change request so that the subscriber ends up being subject to an unauthorized carrier change, the underlying carrier would be liable as a submitting carrier for the unauthorized change. The underlying carrier would not be liable as a submitting carrier, however, if it innocently submitted to the executing carrier a change request that was not verified properly by its reseller.

93. We note that in situations in which a customer initiates or changes long distance service by contacting the LEC directly, verification of the customer's choice would not need to be verified by either the LEC or the chosen IXC. In this situation, neither the LEC nor the IXC is the submitting carrier as we have defined it. The LEC is not providing interexchange service to that subscriber. The IXC has not made any requests -- it has merely been chosen by the consumer. Furthermore, because the subscriber has personally requested the change from the executing carrier, the IXC is not requesting a change on the subscriber's behalf. If a LEC's actions in this situation resulted in the subscriber being assigned to a different interexchange carrier than the one originally chosen by the subscriber, however, then that LEC could be liable for violations of its duties as an executing carrier.

94. We adopt the definition proposed in the *Further Notice and Order* for an executing carrier, so that an executing carrier is generally any carrier that effects a request that a subscriber's telecommunications carrier be changed.[300] This rule will apply even where a reseller competitive local exchange company (CLEC) receives carrier changes and submits such changes to its underlying facilities-based LEC. Some commenters argue that, in such a case, the reseller CLEC should be considered the executing carrier rather than the facilities-based LEC.[301] BellSouth argues that both the CLEC and the facilities-based LEC should be considered executing carriers in this scenario.[302] We conclude that the executing carrier should be the carrier who has actual physical responsibility for making the change to the subscriber's service, rather than a carrier that is merely forwarding a carrier change request on behalf of a subscriber. For example, if a consumer who is subscribed to a reseller CLEC for local exchange service requests a change in interexchange carriers, the executing carrier is the

[299] *See* Appendix A, § 64.1100(e)(1).

[300] *See* Appendix A, § 64.1100(e)(2).

[301] *See, e.g.*, Bell Atlantic Comments at 9.

[302] BellSouth Comments at 7.

facilities-based LEC that makes the software change at its switch, not the CLEC that receives the change order from the IXC and forwards that change order to the facilities-based LEC. For a change from a facilities-based local exchange carrier to a reseller CLEC, the executing carrier would be the facilities-based local exchange carrier who makes the change in its billing records so that the subscriber is billed by the CLEC rather than the facilities-based LEC. In a carrier change situation, the reseller CLEC may have little responsibility except to forward the change request to the facilities-based LEC that actually makes the change. Defining the executing carrier as the carrier that actually makes the change is therefore most appropriate. We note that, where a subscriber is changing to a facilities-based local exchange carrier, that facilities-based local exchange carrier will both "submit" the change, albeit to itself, and also execute that change. We also emphasize, however, that either the reseller or the facilities-based carrier may be treated as an executing carrier if it is responsible for any unreasonable delays in the execution of carrier changes or for the execution of unauthorized carrier changes, including fraudulent authorizations. If, for example, a reseller CLEC forwards to its facilities-based carrier a falsified request for a change in interexchange carriers, in order to benefit the reseller's affiliate, that reseller may be liable as an executing carrier and be subject to the same sanctions that would be imposed on any executing carrier that fails to comply with our rules.[303]

95. We also note that our definition of an executing carrier could also include an IXC in the current environment. When a facilities-based IXC resells service to a switchless reseller, the switchless reseller uses the same carrier identification code (CIC) as the facilities-based IXC. Subscribers of both the facilities-based IXC and the switchless reseller would therefore be on the network of the facilities-based IXC, with the same CIC. CICs are used by LECs to identify different IXCs so that LECs will know to which carrier they should route a subscriber's interexchange traffic.[304] Where a subscriber changes from a facilities-based IXC to a reseller of that facilities-based IXC's services, the reseller submits a carrier change order to the facilities-based IXC. That facilities-based IXC does not submit that change order to the subscriber's LEC because, as far as the LEC is concerned, the routing of calls for that subscriber has not changed due to the fact that the CIC remains the same (*i.e.*, the LEC will still send interexchange calls from that subscriber to the same facilities-based carrier). The facilities-based IXC uses the carrier change request to process the change in its own system, which enables the reseller to begin billing the subscriber. Therefore, in this very limited situation, the executing carrier is the facilities-based IXC, not the LEC. In fact, the facilities-based IXC would be the executing carrier for all carrier changes in which the subscriber remains on the facilities-based IXC's network, regardless of whether the subscriber has changed from a switchless reseller to the reseller's facilities-based IXC, from the facilities-based IXC to a switchless reseller of that IXC's service, or from a switchless reseller of the

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[303] *See infra* discussion on Application of Verification Rules to Submitting and Executing Carriers.

[304] For a full discussion of CICs, *see infra* discussion in Further Notice of Proposed Rulemaking, Resellers and CICs.

facilities-based IXC's service to another switchless reseller of that same IXC's service.

96. Based on BellSouth's recommendation,[305] we clarify that a billing agent has no liability under our verification rules if it is neither an executing or submitting carrier, as defined by our rules.

2. Application of Verification Rules to Submitting and Executing Carriers

97. In the *Further Notice and Order*, the Commission tentatively concluded that the submitting carrier's compliance with our verification rules would facilitate timely and accurate execution of any carrier change, and that an executing carrier would not be required to duplicate the carrier change verification efforts of the submitting carrier.[306] The Commission sought comment on any specific additional or separate verification procedures that should apply to telecommunications carriers that "execute" carrier changes, and the possible effects of such procedures on competition and consumer protection.[307]

98. We conclude that executing carriers should not verify carrier changes prior to executing the change.[308] We agree with several commenters that requiring such verification would be expensive, unnecessary, and duplicative of the submitting carrier's verification.[309] Although executing carriers do not have verification obligations under our rules, they do have a responsibility to ensure that subscribers' carrier changes are executed as soon and as accurately as possible, using the most technologically efficient means available. Executing carriers are required to execute promptly and without any unreasonable delay[310] changes that have been verified by the submitting carrier.[311] In other words, executing carriers may be liable for failure to comply with our rules if their actions result in any unreasonable delay of execution of carrier changes or in unauthorized carrier changes.[312]

99. Some LECs believe that additional verification of carrier changes by executing

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[305] BellSouth Comments at 14.

[306] *Further Notice and Order*, 12 FCC Rcd at 10683.

[307] *Id.*

[308] *See* Appendix A, § 64.1100(a)(2).

[309] *See, e.g.*, Ameritech Comments at 13; BellSouth Comments at 8; MCI Comments at 6.

[310] *See infra* discussion on Timeframe for Execution of Changes.

[311] *See* Appendix A, § 64.1100(a)(2).

[312] Sanctions imposed on executing carriers for violation of our rules may range, for example, from damages proved in state or Commission proceedings to forfeiture penalties imposed by the Commission pursuant to section 503(b) of the Act. *See, e.g.*, 47 U.S.C. §§ 208, 503(b).

carriers would further reduce the incidence of slamming.[313] These parties state that LEC verification has proved effective in avoiding unauthorized PIC changes which may be costly in terms of time devoted to resolution of consumer complaints and in a loss of consumer confidence in the LEC.[314] In contrast, several commenters state that an executing carrier could use verification as an opportunity to delay or deny carrier changes in order to gain a competitive advantage for itself or for affiliated carriers.[315] Although we agree that verification by executing carriers of carrier changes could help to deter slamming, we find that permitting executing carriers to verify independently carrier changes that have already been verified by submitting carriers could have anticompetitive effects. We have concerns that executing carriers would have both the incentive and ability to delay or deny carrier changes, using verification as an excuse, in order to benefit themselves or their affiliates. Furthermore, we find that an executing carrier that attempts to verify a carrier change request would be acting in violation of section 222(b), which states that a carrier that "receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose[.]"[316] The information contained in a submitting carrier's change request is proprietary information because it must submit that information to the executing carrier in order to obtain provisioning of service for a new subscriber. Therefore, pursuant to section 222(b), the executing carrier may only use such information to provide service to the submitting carrier, *i.e.*, changing the subscriber's carrier, and may not attempt to verify that subscriber's decision to change carriers.[317]

100. We also have concerns that an executing carrier's verification of an already verified carrier change could serve as a *de facto* preferred carrier freeze, even in situations in which the subscriber has not requested such a freeze.[318] Preferred carrier freezes require subscribers to contact their executing carriers to lift such freezes before any carrier changes

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313 We incorporate into this proceeding a request from several LECs for an advisory opinion on whether a LEC may, upon receipt of a carrier change order from an IXC, independently verify the carrier change request. *See Request for Advisory Opinion Concerning LEC Customer Notification Procedures Before Implementation of PIC-Change Orders* by Skyline Telephone Membership Corp., Yadkin Valley Telephone Membership Corp., and Bledsoe Telephone Cooperative, filed July 20, 1998 (LEC Advisory Opinion Request).

314 *Id.*

315 *See, e.g.*, AT&T Comments at 2; CompTel Comments at 3; Illinois Commission Comments at 2; TRA Comments at 9. *See also, Ex Parte* Presentation by MCI, Oct. 16, 1998 (MCI Oct. 16, 1998 *Ex Parte* Presentation).

316 47 U.S.C. § 222(b).

317 *See also, infra* discussion on Marketing Use of Carrier Information.

318 *See infra* discussion on Preferred Carrier Freezes.

may be made to their accounts. The verification of a carrier change request by an executing carrier is similar to a preferred carrier freeze because it would require the subscriber first to confirm with the submitting carrier that he or she wishes to make a carrier change, and then to contact the executing carrier to confirm that such a change was authorized. By requiring consumers to take affirmative action in order to change their carriers, preferred carrier freezes provide consumers with additional protection from slamming. But because preferred carrier freezes by their very nature impose additional burdens on subscribers, freezes should only be placed as a result of consumer choice. The preferred carrier freeze works to prevent slamming because it gives a consumer control over carrier changes. The imposition of an "unauthorized preferred carrier freeze" by an executing carrier would take away control from the consumer. We therefore find that, even where verification by an executing carrier would not result in undue delay or denial of a carrier change, such verification is prohibited.

101. Notwithstanding our prohibition on verification of carrier changes by executing carriers, we find that executing carriers may still provide a similar level of protection to their customers in ways that do not raise anticompetitive concerns. Executing carriers may make preferred carrier freezes available for subscribers who have concerns about slamming. In this way, the subscriber who has chosen to have a preferred carrier freeze placed on his or her account will be protected from unauthorized changes to the account. We emphasize that the imposition of a preferred carrier freeze must be authorized by the consumer to minimize any anticompetitive effects and to maintain flexibility for the consumer. Executing carriers also have a variety of methods to notify their subscribers that their carriers have changed. For example, as discussed in the *Truth-in-Billing NPRM*, carriers may choose to include a separate section in their subscriber bills to highlight any changes that have occurred on a subscriber's account, including changes to preferred carriers.[319] We note that most of the telephone bills issued by U S WEST highlight changes that have occurred to a subscriber's account, including changes in preferred carrier selections. Finally, we conclude that the LECs that want to verify carrier changes should experience less concern over slamming in the future because our new rules, especially the absolution remedy, should decrease consumer harm from slamming.[320]

3. Concerns with Certain Executing Carriers

a. Interference with the Execution Process

102. The Commission sought comment in the *Further Notice and Order* on whether ILECs should be subject to different requirements and prohibitions because they may have the

[319] *Truth-in-Billing NPRM*, 13 FCC Rcd at 18186. NAAG proposes to require carriers to notify subscribers in their telephone bills of carrier changes. NAAG Comments at 16.We decline to adopt this proposal in this *Order* because it is more properly addressed in the Truth-in-Billing rulemaking proceeding.

[320] *See supra* discussion on Liability of Subscribers to Carriers.

incentive and the ability to delay or refuse to process carrier change orders in order to avoid losing local customers, or in order to favor an affiliated IXC.[321] We find that ILECs may very well have incentive to act anticompetitively, as would any carrier that executes changes for itself or an affiliate and for competing carriers. For example, a LEC that executes changes in local exchange service for CLECs might be tempted to delay the execution of such changes in order to retain its local exchange customers.

103. We agree with the ILECs, however, that the ability of an executing carrier to act anticompetitively by delaying execution of carrier changes is limited by several statutory provisions in the Act.[322] For example, section 251 requires incumbent LECs to provide facilities and services to requesting telecommunications carriers in a nondiscriminatory manner.[323] Any carrier that unreasonably fails to execute carrier changes for itself (or an affiliate) and for competing carriers within the same timeframe will be in violation of the specific nondiscrimination requirements of section 251 if it is a LEC, as well as in violation of section 201(b)'s prohibition against unjust and unreasonable practices, and section 202(a)'s prohibition against unjust and unreasonable discrimination.[324] Furthermore, any carrier that imposes unreasonable delays in executing carrier changes, both for itself and others, will be in violation of our verification procedures[325] or acting unreasonably in violation of section 201(b),[326] even if it is not acting in violation of a non-discrimination requirement. A party that believes that a carrier is delaying execution of carrier changes in violation of any of these statutory or regulatory provisions should file a complaint in the appropriate forum.[327] We would consider all the facts and circumstances presented in a section 208 complaint proceeding, for example, and take remedial action as appropriate.[328] In this way, we require carriers to provide parity in executing carrier changes for competitors and promptness in

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321 *Further Notice and Order*, 12 FCC Rcd at 10684.

322 *See, e.g.*, Ameritech Comments at 16; Bell Atlantic Comments at 6.

323 *See* 47 U.S.C. § 251(c)(3), (c)(4); *see also* 47 U.S.C. § 271(c)(2)(B)(ii), (xiv); *see also Application of Ameritech Michigan Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543 (1997) (providing that Ameritech must "provision[ ] resale orders within the same average installation interval as that achieved by its retail operations").

324 *See* 47 U.S.C. §§ 251(c)(3), 251(c)(4), 201(b), 202(a).

325 *See* Appendix A, § 64.1100(a)(2).

326 47 U.S.C. § 201(b).

327 For example, a party may file a complaint with the appropriate state commission or with the Commission under section 208 of the Act. *See* 47 U.S.C. § 208.

328 *See* 47 U.S.C. § 208.

executing carrier changes generally.

b. Timeframe for Execution of Carrier Changes

104. Several commenters also support imposing specific deadlines for execution of carrier changes in order to prevent carriers from delaying execution.[329] For example, commenters suggest that carriers that execute carrier changes for themselves and for other carriers be required to implement changes within established deadlines ranging from three to seven days.[330] We decline at this time to adopt any such deadlines. We agree with many commenters that argue that mandating a specific deadline for execution of all carrier changes could be problematic because there may be many legitimate reasons for a delay in the execution of a carrier change, such as a consumer request for a delay in implementation, or the administrative burden of processing a large number of change orders.[331] We also find that it would not be feasible to establish a specific deadline for execution of changes that would accommodate the needs of the wide variety of carriers in the marketplace, including smaller carriers. Some commenters propose that we also require a carrier that executes changes for itself and for other carriers to submit a report comparing the execution times for changes submitted by itself or its affiliates against changes submitted by competing carriers.[332] We decline to do so at this time because we conclude that the non-discrimination requirements of sections 202(a) and 251[333] already prohibit executing carriers from imposing discriminatory delays on their competitors.[334]

105. Although we decline to adopt specific execution timeframes for the reasons

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329 *See, e.g.*, North Carolina Commission Comments at 3-4; TRA Comments at 16.

330 *See, e.g.*, Excel Comments at 5 (suggesting that carrier changes be executed within seven days); Texas Commission Comments at 3 (suggesting that carrier changes be executed within three days).

331 *See, e.g.*, Ameritech Reply Comments at 19; GTE Reply Comments at 19.

332 *See, e.g.*, CompTel Comments at 6; LCI Comments at 5; and NYSCPB Comments at 21.

333 *See* 47 U.S.C. §§ 251(c)(3), 251(c)(4), 202(a).

334 We note that the Commission is considering the issue of reporting requirements for certain ILEC activities in another proceeding. *See Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, 13 FCC Rcd 12817 (1998); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), motion for stay denied, 11 FCC Rcd 11754 (1996), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *further recon. pending, appeal pending sub nom. Iowa Util. Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, partial stay granted pending review, 109 F.3d 418 (8th Cir. 1996), order lifting stay in part (8th Cir. Nov. 1, 1996), *motion to vacate stay denied*, 117 S. Ct. 429 (1996).

stated above, we believe that subscribers should be informed of how long it will take for a carrier change to become effective because they have the right to know when they will be able to use their new service. We strongly encourage a submitting carrier to inform subscribers of the expected timeframe for implementing the carrier change, if it is able to obtain such information from the executing carrier. Such information lets the subscriber know what to expect and allows the subscriber to plan his or her calling patterns accordingly. Such information also would give carriers and subscribers alike a standard by which to determine if a delay is unreasonable. Although we do not establish any specific standard for execution of changes in this proceeding, we may revisit this issue in a later proceeding. In the meantime, we expect carriers to fulfill subscriber requests as quickly as possible, using the most technologically efficient means available to implement changes to subscribers' telecommunications services. Noncompliance with this standard could be considered unreasonable delay.

c. Marketing Use of Carrier Change Information

106. In the *Further Notice and Order*, the Commission voiced concern that an incumbent LEC might attempt to engage in conduct that would blur the distinction between its role as a neutral executing carrier and its objectives as a marketplace competitor.[335] Specifically, the Commission stated that an example of this type of conduct could occur if an incumbent executing carrier sends a subscriber who has chosen a new carrier a promotional letter (winback letter) in an attempt to change the subscriber's decision to switch to another carrier.[336] We conclude that this is a valid concern and therefore find that an executing carrier may not use information gained from a carrier change request for any marketing purposes, including any attempts to change a subscriber's decision to switch to another carrier.[337] Many commenters support this decision.[338] As explained above, we find that carrier change information is carrier proprietary information[339] and, therefore, pursuant to section 222(b), the executing carrier is prohibited from using such information to attempt to change the

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[335] *Further Notice and Order*, 12 FCC Rcd at 10684.

[336] *Id.*

[337] *See* Appendix A, section 64.1100(a)(2).

[338] *See, e.g.*, Ameritech Reply at 17-18; MCI Comments at 7-8; Texas Commission Comments at 3.

[339] *See supra* discussion in Application of Verification Rules to Submitting and Executing Carriers (concluding that section 222(b) prohibits an executing carrier from using carrier change information to verify a subscriber's decision to change carriers after such change has been verified by the submitting carrier).

subscriber's decision to switch to another carrier.[340] More specifically, section 222(b) states that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."[341] The submitting carrier's change request is proprietary information because it must submit that information to the executing carrier in order to obtain provisioning of service for a new subscriber. In the *CPNI Order*, we stated that Congress' goal of promoting competition and preserving customer privacy would be furthered by protecting the competitively-sensitive information of other carriers from network providers that gain access to such information through provision of wholesale service.[342] Similarly, in the situation of executing carriers and carrier change requests, section 222(b) works to prevent anticompetitive conduct on the part of the executing carrier by prohibiting marketing use of carrier proprietary information. The executing carrier otherwise would have no knowledge at that time of a consumer's decision to change carriers, were it not for the executing carrier's position as a provider of switched access services. Therefore, when an executing carrier receives a carrier change request, section 222(b) prohibits the executing carrier from using that information to market services to that consumer.

107. GTE and U S WEST contend that, because customer solicitations are protected by the First Amendment, the Commission should not prohibit executing carriers from winback solicitations as long as such solicitations are based on the executing carriers' own information, do not interfere with execution processing, and are not made in conjunction with notification to customers of carrier changes.[343] As stated above, we conclude that section 222(b) only prohibits an executing carrier from marketing using information from a carrier change request because the executing carrier is not using its own information, but rather the submitting carrier's proprietary information, which GTE and U S WEST agree is a reasonable limitation. Furthermore, section 222(b) does not prohibit all winback attempts, but only those that are based on carrier proprietary information. Finally, because our rule merely implements section 222(b), any possible First Amendment concerns would need to be addressed to the federal courts and Congress, not the Commission. Nonetheless, we conclude that section 222(b) and its application to this situation are entirely lawful and do not impermissibly infringe on carriers' First Amendment rights. It is true that the First Amendment protects commercial

[340] 47 U.S.C. § 222(b). We note that, although section 222(b) prohibits the use of carrier change information for marketing purposes in this situation, the scope of section 222(b) is not limited to this particular application and may be construed broadly to cover a variety of situations.

[341] *Id.*

[342] *CPNI Order*, 13 FCC Rcd at 8201.

[343] GTE Reply Comments at 13; U S WEST Comments at 21.

speech from unwarranted governmental intrusion.[344] The government may, however, regulate commercial speech that is not misleading or unlawful if: (1) the asserted governmental interest is substantial; (2) if the regulation directly advances the asserted governmental interest; and (3) if the regulation is not more extensive than is necessary to serve that interest.[345] In this case, we find that prohibiting executing carriers from using carrier proprietary information for marketing purposes in violation of section 222(b) does not impermissibly infringe upon First Amendment rights.

108. First, the Commission's interest in promulgating the rule is substantial. Section 222(b) is intended to advance competition and, as part of that goal, to protect consumer choices. The Supreme Court has recognized that eliminating restraints on competition is a "substantial" government interest.[346] Furthermore, the fact that the 1996 Act was enacted in order to open "all telecommunications markets to competition"[347] also demonstrates that the governmental interest in promoting competition is very substantial. In fulfilling the Congressional mandate to promote competition in all telecommunications markets, the Commission helps to ensure that the American public derives the full benefit of such competition by giving them the opportunity to choose new and better products and services at affordable rates, and by giving effect to such choices.

109. Second, the rule directly advances the governmental interest. The rule, governed by section 222(b), promotes competition and protects consumer choices by prohibiting executing carriers from using information gained solely from the carrier change transaction to thwart competition by using the carrier proprietary information of the submitting carrier to market the submitting carrier's subscribers. The rule places a limited prohibition on executing carriers because an executing carrier should be a neutral party without any interest in the choice of carriers made by a subscriber. Because of its position as a monopoly service provider, however, it may gain access through the carrier change process

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[344] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980) (*Central Hudson*).

[345] *Central Hudson*, 447 U.S. at 566. The four-part analysis requires the following: first, a determination of whether the expression is protected by the First Amendment; second, a determination of whether such expression concerns lawful activity and is not misleading; third, a determination of whether the asserted governmental interest is substantial; fourth, a determination of whether the regulation directly advances the asserted government interest and whether it is not more extensive than is necessary to serve that interest. *Id.* We acknowledge that the first two parts of this test are satisfied because the commercial speech involved is both protected by the First Amendment and that the commercial speech involved does concern lawful activity and is not misleading.

[346] *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.").

[347] *See* Joint Explanatory Statement at 1.

to a submitting carrier's proprietary information, *i.e.*, that the submitting carrier needs service provisioning for a new subscriber. The rule we adopt ensures that the executing carrier remains in its role as a neutral administrator of carrier changes, and prevents the executing carrier from shifting into a competitive role against the submitting carrier using carrier proprietary information.

110. Third, the rule is not more extensive than is necessary to serve the governmental interest. The rule is narrowly tailored so that it only prohibits the marketing use of carrier proprietary information gained from the carrier change request. Accordingly, the rule would not prohibit a general marketing scheme that may coincidentally target a subscriber who has requested a carrier change because such activity would not entail the use of information gained solely by a carrier from a carrier change transaction.

111. Based on the above analysis, we conclude that prohibiting the use of carrier proprietary information gained from a carrier change request for marketing purposes, pursuant to section 222(b), does not impermissibly interfere with carriers' First Amendment rights. We have shown that the Commission's interest in promulgating this rule, to promote competition, is substantial because competition will give the American people access to new, better, and more affordable telecommunications services. We also have shown that the rule directly advances the interest of promoting competition by preventing the executing carrier from thwarting competition by using carrier proprietary information gained from the carrier change request to interfere with subscriber decisions. Finally, we have shown that the rule is not more extensive than necessary to serve our interest in promoting competition because the prohibition is limited only to marketing use of carrier proprietary information gained from the carrier change request.

F. Use of Preferred Carrier Freezes

1. Background

112. In the *Further Notice and Order*, the Commission sought comment on whether it should adopt rules to address preferred carrier freeze practices.[348] The Commission noted that, although neither the Act nor its rules and orders specifically address preferred carrier freeze practices,[349] concerns about carrier freeze solicitations have been raised with the

[348] *Further Notice and Order*, 12 FCC Rcd at 10,687-89. A preferred carrier freeze (or freeze) prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent.

[349] We noted also that the Common Carrier Bureau Enforcement Division has previously reviewed certain preferred carrier freeze practices and found them to be consistent with the Act and the Commission's rules and orders. *See, e.g.*, Staff Interpretive Ruling Regarding Preemptive Effect of Commission's Regulations Governing Changes of Consumers' Primary Interexchange Carriers and the Communications Act of 1934, As Amended, On Particular Enforcement Action Initiated by the California Public Utilities

Commission.[350] The Commission noted, moreover, that MCI filed a Petition for Rulemaking on March 18, 1997, requesting that the Commission institute a rulemaking to regulate the solicitation, by any carrier or its agent, of carrier freezes or other carrier restrictions on a consumer's ability to switch his or her choice of interexchange (interLATA or intraLATA toll) and local exchange carrier.[351] The Commission determined that it was appropriate to consider MCI's petition in the *Further Notice and Order* and, therefore, incorporated MCI's petition and all responsive pleadings into the record of this proceeding.[352]

2. Overview and Jurisdiction

113. We adopt rules to clarify the appropriate use of preferred carrier freezes because we believe that, although preferred carrier freezes offer consumers an additional and beneficial level of protection against slamming, they also create the potential for unreasonable and anticompetitive behavior that might affect negatively efforts to foster competition in all markets. Thus, in adopting rules to govern the use of preferred carrier freeze mechanisms, we appropriately balance several factors, including consumer protection, the need to foster competition in all markets, and our desire to afford carriers flexibility in offering their customers innovative services such as preferred carrier freeze programs.[353] Moreover, in so doing we facilitate customer choice of preferred carrier selections and adopt and promote procedures that prevent fraud.

114. While we are confident that our carrier change verification rules, as modified in this *Order*, will provide considerable protection for consumers against unauthorized carrier changes, we recognize that many consumers wish to utilize preferred carrier freezes as an

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Commission, DA 96-1077, 11 FCC Rcd 20453 (July 3, 1996); *see also* Letter, Elliot Burg, Esq., Asst. Attorney General, State of Vermont, 11 FCC Rcd 1899 (1995).

[350] *See, e.g.*, Letter from Donald F. Evans, MCI Telecommunications Corporation to John Muleta, FCC (July 31, 1996).

[351] MCI Petition for Rulemaking, RM-9085 (filed Mar. 18, 1997) (MCI Petition). AT&T has indicated that it "strongly supports" MCI's petition to establish regulations governing preferred carrier freezes. Letter from Mark C. Rosenblum, AT&T Corp. to Regina M. Keeney, FCC (Apr. 9, 1997). The Commission established a pleading cycle for comments regarding the MCI petition. *See* Public Notice, DA 97-942 (rel. May 5, 1997). Comments in response to that Public Notice are referred to as "Petition Comments" and "Petition Replies."

[352] *Further Notice and Order*, 12 FCC Rcd at 10,687-88.

[353] *See, e.g.*, Ohio Commission Comments at 12.

additional level of protection against slamming.[354] As noted in the *Further Notice and Order*, a carrier freeze prevents a change in a subscriber's preferred carrier selection until the subscriber gives the carrier from whom the freeze was requested his or her written or oral consent.[355] The record demonstrates that LECs increasingly have made available preferred carrier freezes to their customers as a means of preventing unauthorized conversion of carrier selections.[356] The Commission, in the past, has supported the use of preferred carrier freezes as a means of ensuring that a subscriber's preferred carrier selection is not changed without his or her consent.[357] Indeed, the majority of commenters in this proceeding assert that the use of preferred carrier freezes can reduce slamming by giving customers greater control over their accounts.[358] Our experience, thus far, has demonstrated that preventing unauthorized carrier changes enhances competition by fostering consumer confidence that they control their choice of service providers. Thus, we believe that it is reasonable for carriers to offer, at their discretion, preferred carrier freeze mechanisms that will enable subscribers to gain greater control over their carrier selection.

115. In the *Further Notice and Order*, however, we stated that preferred carrier freezes may have the effect of limiting competition among carriers.[359] We share commenters' concerns that in some instances preferred carrier freezes are being, or have the potential to be, implemented in an unreasonable or anticompetitive manner.[360] Indeed, we note that a number

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[354] *See, e.g.*, NYSDPS Comments at 8-9; Ameritech Petition Comments at 8 (noting that number of Ameritech Illinois customers utilizing freezes increased from 35,000 to 200,000 between 1993 and 1995); SNET Reply Comments at 4.

[355] *See Further Notice and Order*, 12 FCC Rcd at 10,688.

[356] *See, e.g.*, Bell Atlantic Comments at 4 ("Bell Atlantic began offering PC freezes in response to its subscriber's demands for protection from slamming."); SNET Comments at 6-7. It appears, based on the record, that particular PC freeze administration practices can vary widely between carriers (*e.g.*, some carriers require written consent to lift a freeze while others require oral consent to lift a freeze). *See, e.g.*, GTE Comments at 13 (stating that GTE requires customers to complete and return special form before freeze is lifted); Ameritech Comments at 21 (stating that Ameritech offers 24 hour telephone line for customers to lift freeze).

[357] *See, e.g.*, Federal Communications Commission, Common Carrier Scorecard (Fall 1996); *Policy and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Report and Order, 10 FCC Rcd 9560, 9574, n.58 (1995) (*1995 Report and Order*).

[358] *See, e.g.*, NAAG Comments at 11; NCL Comments at 9; Texas Commission Comments at 4; Ameritech Comments at 21; GTE Reply Comments at 14; AT&T Comments at 18.

[359] *See Further Notice and Order*, 12 FCC Rcd at 10,688.

[360] *See, e.g.*, MCI Petition at 2-8; CompTel Comments at 8 ("In fact, the incumbent LEC's strategic use of PC-freezes belies any claim that they are using PC-freezes to protect consumers from slamming."); PaOCA at 7; RCN Reply Comments at 7-8.

of state commissions have determined,[361] and certain LECs concede,[362] that unregulated preferred carrier freezes are susceptible to such abuses. By definition, preferred carrier freezes create an additional step (namely, that subscribers contact directly the LEC that administers the preferred carrier freeze program) that customers must take before they are able to obtain a change in their carrier selection.[363] Where customers fail to take the additional step of lifting a preferred carrier freeze, their otherwise valid attempts to effectuate a change in carrier selection will be frustrated. Observing this process, some commenters argue that certain preferred carrier freeze programs are so onerous as to create an unreasonable hurdle for subscribers and submitting carriers seeking to process a carrier change.[364] Other commenters, primarily interexchange carriers, suggest that LECs are using deceptive preferred carrier freeze solicitation practices to "lock up" consumers, without their understanding, as part of an effort to stifle competition in their markets.[365]

116. Particularly given the market structure changes contemplated in the 1996 Act,[366] we are persuaded that incentives for unreasonable preferred carrier freeze practices exist. With the removal of legal and regulatory barriers to entry, carriers are now or soon will be able to enter each other's markets and provide various services in competition with one another.[367] Incumbent LECs have, or will have in the foreseeable future, authorization to compete in the market for interLATA services. Similarly, incumbent LECs are preparing to face or are facing competition in the local exchange and intraLATA toll markets. Given these

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361 *See, e.g.*, Michigan Public Service Commission, *Sprint Communications Company, L.P. v. Ameritech Michigan*, Case No. U-11038 (Aug. 1, 1996); Public Utilities Commission of Ohio, *Complaint of Sprint Communications Company, L.P. v. Ameritech Ohio*, Case No. 96-142-TP-CSS (Feb. 20, 1997); New Jersey Board of Public Utilities, *Investigation of IntraLATA Toll Competition for Telecommunications Services on a Presubscription Basis*, Docket No. TX94090388 (June 3, 1997). *Cf.* California Public Utilities Commission, *Alternative Regulatory Frameworks for Local Exchange Carriers*, Decision 97-04-083 (Apr. 23, 1997). *See also* North Carolina Commission Comments at 4; NAAG Comments at 11.

362 *See, e.g.*, Ameritech Reply Comments at 9; USTA Comments at 7 ("USTA agrees that PC freezes do have the ability to hinder competition if the Commission's rules permit improper use of them.").

363 *See Further Notice and Order*, 12 FCC Rcd at 10,688.

364 *See, e.g.*, Worldcom Petition Comments at 5; MCI Comments at 11; LCI Reply Comments at 8; *see also* NAAG Comments at 11.

365 *See, e.g.*, Sprint Petition Comments at 7 (citing examples of Ameritech practices in Illinois and Michigan); TRA Comments at 23; *see also* Ohio Commission Comments at 10-12.

366 *See* Joint Explanatory Statement (stating that the principal goal of the 1996 Act is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

367 *See, e.g.*, 47 U.S.C. §§ 251-252, 271.

changes in market structure, incumbent LECs may have incentives to market preferred carrier freezes aggressively to their customers and to use different standards for placing and removing freezes depending on the identity of the subscriber's carrier.[368] Despite these market changes, it appears that, at this time, facilities-based LECs -- most of which are incumbent LECs -- are uniquely situated to administer preferred carrier freeze programs. Thus, other carriers are dependent on the LECs to offer preferred carrier freeze services to their customers.

117. We conclude, contrary to the assertions of Bell Atlantic, that we have authority under section 258 to address concerns about anticompetitive preferred carrier freeze practices for intrastate, as well as interstate, services.[369] Congress, in section 258 of the Act, has granted this Commission authority to adopt verification rules applicable to both submission and execution of changes in a subscriber's selection of a provider of local exchange or telephone toll services.[370] Preferred carrier freezes directly impact the verification procedures which Congress instructed the Commission to adopt because they require subscribers to take additional steps beyond those described in the Commission's verification rules to effectuate a carrier change. Moreover, where a preferred carrier freeze is in place, a submitting carrier that complies with our verification rules may find that its otherwise valid carrier change order is rejected by the LEC administering the freeze program. Since preferred carrier freeze mechanisms can essentially frustrate the Commission's statutorily authorized procedures for effectuating carrier changes, we conclude that the Commission has authority to set standards for the use of preferred carrier freeze mechanisms.

118. Based on this authority, we prescribe rules to ensure the fair and efficient use of preferred carrier freezes for intrastate and interstate services to protect customer choice and, correspondingly, to promote competition. Specifically, in the following sections, we adopt rules that apply, on a going-forward basis, to all carriers and that provide for the nondiscriminatory solicitation, implementation, and lifting of preferred carrier freezes.

3. Nondiscrimination and Application of Rules to All Local Exchange Carriers

119. We conclude, and codify in our rules implementing section 258 of the Act, that preferred carrier freezes should be implemented on a nondiscriminatory basis so that LECs do not use freezes as a tool to gain an unreasonable competitive advantage. Given that LECs are

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[368] *See, e.g.*, MCI Comments at 18; Worldcom Comments at 9-10; Sprint Petition Comments at 5 ("In the past, most LECs did not actively promote PIC freezes . . . . "); TRA Comments at 18; *cf.* TOPC Reply Comments at 5.

[369] Bell Atlantic and NYNEX Petition Comments at 1, n.1 ("The Commission has no jurisdiction to regulate PIC freezes or other LEC practices regarding intrastate services . . . .").

[370] 47 U.S.C. § 258. *See supra* discussion on Application of the Verification Rules to the Local Market. *See also* Sprint Petition Reply Comments at 4.

uniquely positioned to offer preferred carrier freezes, as described above, we believe that a nondiscrimination requirement is necessary to prevent unreasonable practices, such as denying freezes to the customers of their competitors. Accordingly, local exchange carriers must make available any preferred carrier freeze mechanism to all subscribers, under the same terms and conditions, regardless of the subscribers' carrier selection.[371] We note that a number of LECs, including Ameritech and GTE, indicate that they already offer preferred carrier freezes to customers on a nondiscriminatory basis.[372] Similarly, we state our expectation that LECs should not be able to impose discriminatory delays when lifting freezes.[373] Since the Commission has long recognized that incumbent LECs may have the incentive to discriminate in the provision of service to their competitors,[374] we believe that articulating this nondiscrimination requirement will ensure that the same level of protection is available to all subscribers.

120. At the same time, we conclude that our rules for preferred carrier freezes should apply to all local exchange carriers. We reject those proposals to place additional requirements on incumbent LECs, to the exclusion of competitive LECs.[375] Where a competitive LEC offers a preferred carrier freeze program, that competitive LEC must comply with our preferred carrier freeze rules, as set out in this *Order*. This policy is appropriate because we expect that a competitive LEC may face the same incentives to discriminate in the provision of preferred carrier freeze service to the customers of its competitors. In addition, subscribers of competitive LECs have the same right to expect that preferred carrier freeze programs will be nondiscriminatory and not deceptive or misleading, as do subscribers of incumbent LECs.

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[371] *See*, Appendix A, § 64.1190(b). *See also, e.g.*, MCI Petition at 9; TRA Petition Comments at 8; CompTel Petition Comments at 2; CompTel Comments at 9; TOPC Reply Comments at 5; Citizens Petition Comments at 5.

[372] *See, e.g.*, Ameritech Reply Comments at 11; GTE Comments at 12 ("GTE treats all carriers, including affiliates, the same for PC-change freeze purposes.").

[373] We concluded above that the nondiscrimination requirements of sections 202(a) and 251 prohibit executing carriers from imposing discriminatory delays on their competitors when executing preferred carrier changes. *See supra* discussion on Timeframe for Execution of Carrier Changes. We believe that sections 202(a) and 251 may also restrict incumbent LECs' ability to use preferred carrier freezes for anticompetitive conduct.

[374] *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, CC Docket No. 96-149 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*").

[375] *See, e.g.*, AT&T Petition Comments at 6; CompTel Petition Comments at 6.

4. Solicitation and Implementation of Preferred Carrier Freezes

121. We adopt minimum standards to govern the solicitation and implementation of preferred carrier freezes in order to deter anticompetitive application of freeze practices and to ensure that consumers are able to make more informed decisions on whether to utilize a freeze. We share concerns of some commenters that certain carriers may solicit preferred carrier freezes in a manner that is unreasonable under the Act.[376] The record indicates the potential for customer confusion. It appears that many consumers are unclear about whether preferred carrier freezes are being placed on their carrier selections and about which services or carriers are subject to these freezes.[377] We find that the most effective way to ensure that preferred carrier freezes are used to protect consumers, rather than as a barrier to competition, is to ensure that subscribers fully understand the nature of the freeze, including how to remove a freeze if they chose to employ one. We thus conclude that, in order to be a just and reasonable practice, any solicitation and other carrier-provided information concerning a preferred carrier freeze program should be clear and not misleading.[378] Moreover, we adopt the tentative conclusion, as set forth in the *Further Notice and Order*, that any solicitation for preferred carrier freezes should provide certain basic explanatory information to subscribers about the nature of the preferred carrier freeze.[379] Our decision to adopt rules governing the solicitation of preferred carrier freezes is supported by the vast majority of commenters, including state commissions and a number of incumbent LECs.[380]

122. We specifically decide that, at a minimum, carriers soliciting preferred carrier freezes must provide: 1) an explanation, in clear and neutral language, of what a preferred carrier freeze is and what services may be subject to a preferred carrier freeze; 2) a description of the specific procedures necessary to lift a preferred carrier freeze and an explanation that these steps are in addition to the Commission's regular verification rules for changing subscribers' carrier selections and that the subscriber will be unable to make a change in carrier selection unless he or she lifts the freeze; and 3) an explanation of any charges associated with the preferred carrier freeze service.[381] We decline, at this time, to mandate specific language to describe preferred carrier freezes because we believe that our

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[376] *See, e.g.*, AT&T Petition Comments at 4-5; Sprint Petition Comments at 7; TRA Comments at 23.

[377] *See, e.g.*, MCI Petition at 4, n.3; NAAG Comments at 12.

[378] *See also* 47 U.S.C. § 201(b).

[379] *See Further Notice and Order*, 12 FCC Rcd at 10688.

[380] *See, e.g.*, NYSCPB Reply Comments at 9 ("Commission properly . . . proposed rules that would limit such promotional materials."); NAAG at 12; Ameritech Reply Comments at 10; CompTel Comments at 9.

[381] *See* Appendix A, § 64.1190(d)(1).

rules will provide carriers with sufficient guidance to formulate scripts that inform customers about preferred carrier freezes in a neutral manner while preserving carrier flexibility in the message.[382]

123. We also conclude that preferred carrier freeze procedures, including any solicitation, must clearly distinguish among telecommunications services subject to a freeze, *i.e.*, between local, intraLATA toll, interLATA toll, and international toll services.[383] This rule will address concerns raised by commenters, including MCI and NAAG, that consumers may experience confusion about the differences between telecommunications services when employing freezes.[384] It will also serve to prevent unscrupulous carriers from placing freezes on all of a subscriber's services when the subscriber only intended to authorize a freeze for a particular service or services.[385] We thus conclude that "account level" freezes are unacceptable and that, instead, carriers must explain clearly the difference in services and obtain separate authorization for each service for which a preferred carrier freeze is requested.[386] We note that a broad range of commenters, including many incumbent LECs, agree that customers should have the ability to place individual freezes on their interLATA, intraLATA toll, and local services.[387] While some members of the public may still be unclear about the distinctions between different telecommunications services, particularly the difference between intraLATA toll and interLATA toll services, we expect that carriers can help customers to develop a better understanding of these services.

124. We decline those suggestions that we prohibit LECs from taking affirmative steps to make consumers aware of preferred carrier freezes because we believe that preferred carrier freezes are a useful tool in preventing slamming. Nor do we draw distinctions between "solicitation" and "educational materials" that some commenters urge us to adopt.[388] We instead believe that the standards adopted herein will provide sufficient guidance for consumers. At the same time, we decline the suggestions of those parties who would have us require LECs affirmatively to distribute literature describing their preferred carrier freeze

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[382] *See* MCI Comments at 17 ("Commission should consider requiring the use of standard language . . ."); NYSCPB Reply Comments at 9; Excel Reply Comments at 4.

[383] *See* Appendix A, § 64.1190(c).

[384] MCI Comments at 14, n.15; NAAG Comments at 12. *See also* U S WEST Reply Comments at 24, n.74; TRA Comments at 25-26.

[385] *See, e.g.*, Ameritech Petition Comments at 14; AT&T Petition Reply Comments at 7.

[386] *See* Appendix A, § 64.1190(c).

[387] *See, e.g.*, USTA Comments at 7; AT&T Petition Reply at 7; Puerto Rico Telephone Company Petition Reply at 4; LCI Reply Comments at 9.

[388] *See, e.g.*, CBT Comments at 8.

programs.[389] Should states wish to adopt such requirements, we believe that it is within their purview to do so.

125. We adopt our proposal to extend our carrier change verification procedures to preferred carrier freeze solicitations and note that this proposal was supported by a wide range of carriers, state commissions, and consumer organizations.[390] By requiring LECs that administer preferred carrier freeze programs to verify a subscriber's request to place a freeze, we expect to reduce customer confusion about preferred carrier freezes and to prevent fraud in their implementation. According to a number of commenters, customer confusion over preferred carrier freezes often results in valid carrier change orders being rejected by LECs.[391] In combination with our requirement that carriers obtain separate authorization for each telecommunications service subject to the freeze, these verification procedures will further ensure that subscribers understand which services will be subject to a preferred carrier freeze.[392] Requiring LECs that offer preferred carrier freezes to comply with the Commission's verification rules will also minimize the risk that unscrupulous carriers might attempt to impose preferred carrier freezes without the consent of subscribers.[393] We find such a practice to be unreasonable because it frustrates consumers' choice in carriers by making it more difficult for the consumer to switch carriers.

126. Our verification rules are designed to confirm a subscriber's wishes while imposing the minimum necessary burden on carriers. We agree with BellSouth that applying the Commission's verification rules to preferred carrier freezes will enable subscribers to

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[389] *See, e.g.*, TOPC Reply Comments at 5; OCC Reply Comments at 4; CBT Comments at 9. We note that some LECs do not affirmatively market their preferred carrier freeze programs. *See, e.g.*, SBC Comments at 8, 10.

[390] *See* Appendix A, § 64.1190(d)(2). *See Further Notice and Order*, 12 FCC Rcd at 10,687-89. *See, e.g.*, Worldcom Comments at 9; Intermedia Comments at 6; BellSouth Comments at 4; Texas Commission Comments at 4; PaOCA Comments at 7.

[391] *See, e.g.*, Sprint Petition Comments at 8 (rejection of the preferred carrier change order "may occur weeks after such customers have chosen to switch . . . "); CompTel Petition Comments at 4; MCI Comments at 14-15.

[392] We note that, where a subscriber seeks to place a freeze on more than one of his or her services, the separate authorization and verification may be received and conducted during the same telephone conversation or may be obtained in separate statements on the same written request for a freeze.

[393] *See* AT&T Comments at 18 ("extending the verification rules to the freeze mechanism may help to curb competitive abuse of that procedure . . ."); BellSouth Comments at 4 (rules will "provide some protection against unscrupulous carriers that attempt to limit competition by imposing PC freezes without the subscriber's authorization").

obtain preferred carrier freeze protection with a minimum of effort.[394] By adopting the same verification procedures for both carrier changes and preferred carrier freezes, we expect that the process of implementing preferred carrier freezes will be less confusing for subscribers and administratively more efficient for carriers. We reject other commenter proposals, such as AT&T's proposal to require that LECs confirm preferred carrier freezes in writing.[395] We think that our verification rules will be adequate to ensure that subscribers' choices, whether for carrier changes or preferred carrier freezes, are honored.

5. Procedures for Lifting Preferred Carrier Freezes

127. We conclude that LECs offering preferred carrier freeze programs must make available reasonable procedures for lifting preferred carrier freezes. Based on the record before us, we are concerned that some procedures for lifting preferred carrier freezes may place an unreasonable burden on subscribers who wish to change their carrier selections.[396] In addition, and as noted above, we are concerned that consumers are not being fully informed about how freezes work, and therefore often fail to appreciate the significance of implementing a freeze at the time they make the choice. This concern is particularly acute in markets where competition has not yet fully developed so that consumers are aware of the choices they have or will have in the future. We conclude that adopting baseline standards for the lifting of preferred carrier freezes will appropriately balance the interests of Congress in opening markets to competition by protecting consumer choice, preventing anticompetitive practices, and providing consumers a potentially valuable tool to protect themselves from fraud. Thus, carriers must offer subscribers a simple, easily understandable, but secure, way of lifting preferred carrier freezes in a timely manner.[397]

128. With these concerns for promoting customer choice in mind, we conclude that a LEC administering a preferred carrier freeze program must accept the subscriber's written and signed authorization stating an intent to lift a preferred carrier freeze.[398] Such written authorization -- like the LOAs authorized for use in carrier changes and to place a preferred carrier freeze -- should state the subscriber's billing name and address and each telephone number to be affected. In addition, the written authorization should state the subscriber's intent to lift the preferred carrier freeze for the particular service in question. We think that this procedure is clearly consistent with the purpose of the preferred carrier freeze because it

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[394] *See* BellSouth Comments at 4.

[395] AT&T Comments at 19, n.23.

[396] *See, e.g.,* MCI Comments at 15-17; CompTel Petition Comments at 2.

[397] *See, e.g.,* IXC Long Distance Reply Comments at 5; Ameritech Reply Comments at 10; MCI Petition at 9.

[398] *See* Appendix A, § 64.1190(e)(1).

permits the subscriber to notify the LEC directly of her or his intention to lift a preferred carrier freeze.[399] By requiring LECs to accept such authorization, we ensure that subscribers will have a simple and reliable way of lifting preferred carrier freezes, and thus making a carrier change.

129. We similarly conclude that LECs offering preferred carrier freeze programs must accept oral authorization from the customer to remove a freeze and must permit submitting carriers to conduct a three-way conference call with the LEC and the subscriber in order to lift a freeze.[400] In this regard, we agree, for example, with the Texas Office of Public Utility Counsel that three-way calling is an effective means of having a preferred carrier freeze lifted during an initial conversation between a subscriber and a submitting carrier.[401] Specifically, three-way calling allows a submitting carrier to conduct a three-way conference call with the LEC administering the freeze program while the consumer is still on the line, *e.g.*, during the initial telemarketing session, so that the consumer can personally request that a particular freeze be lifted. We are not persuaded by certain LECs' claims that three-way calling is unduly burdensome or raises the risk of fraud.[402] We do not anticipate that the volume of subscribers seeking to lift their preferred carrier freezes will be overly burdensome for these carriers' customer support staff. Further, we expect that LECs administering preferred carrier freeze programs will be able to recover as part of the carrier change charge the cost of making such three-way calling available.[403] We also believe that three-way calling will effectively prevent fraud because a three-way call establishes direct contact between the LEC and the subscriber. We expect that the LEC administering the preferred carrier freeze program will have the opportunity to ask reasonable questions designed to determine the identity of the subscriber during an oral authorization, such as a three-way call, to lift a freeze.[404] Finally, the three-way call procedure merely lifts the preferred carrier freeze. In addition, a submitting carrier must follow the Commission's verification rules before submitting a carrier change. For example, an interexchange carrier wishing to submit a carrier change for a customer with a preferred carrier freeze would comply with our verification rules for carrier changes, perhaps by using third-party verification, and then, if

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[399] *See, e.g.*, U S WEST Reply Comments at 25; USTA Reply Comments at 5; TNRA Comments at 3.

[400] *See* Appendix A, § 64.1190(e)(2).

[401] TOPC Reply Comments at 5. *See also* AT&T Petition Comments at 7; Telco Comments at 8-9; Ohio Commission Comments at 11; Worldcom Comments at 10.

[402] *See, e.g.*, GTE Petition Comments at 5; Citizens Petition Reply at 5; Ameritech Petition Comments at 21.

[403] Moreover, we can revisit these conclusions if further experience indicates that these rules become unduly burdensome.

[404] *See* AT&T Petition Reply at 5, n.8.

necessary, could perform a three-way call with the LEC administering the preferred carrier freeze program to lift the freeze -- all before submitting its carrier change order to the executing carrier.

130. We decline to enumerate all acceptable procedures for lifting preferred carrier freezes. Rather, we encourage parties to develop new means of accurately confirming a subscriber's identity and intent to lift a preferred carrier freeze, in addition to offering written and oral authorization to lift preferred carrier freezes. Other methods should be secure, yet impose only the minimum burdens necessary on subscribers who wish to lift a preferred carrier freeze.[405] Thus, we do not adopt IXC Long Distance's proposal to require that LECs give customers a unique password or personal identification number.[406] While some LECs may find such a proposal useful, we need not mandate its use, given our decision to adopt the procedures for lifting preferred carrier freezes described above.

131. We agree with Ameritech and those commenters who suggest that the essence of the preferred carrier freeze is that a subscriber must specifically communicate his or her intent to request or lift a freeze.[407] Because our carrier change rules allow carriers to submit carrier change requests directly to the LECs, the limitation on lifting preferred carrier freezes gives the freeze mechanism its protective effect. We disagree with MCI that third-party verification of a carrier change alone should be sufficient to lift a preferred carrier freeze.[408] Were we to allow third-party verification of a carrier change to override a preferred carrier freeze, subscribers would gain no additional protection from the implementation of a preferred carrier freeze. Since we believe that subscribers should have the choice to implement additional slamming protection in the form of preferred carrier freeze mechanisms, we do not adopt MCI's proposal.

132. We expect that, in three-way calls placed to lift a preferred carrier freeze, carriers administering freeze programs will ask those questions necessary to ascertain the identity of the caller and the caller's intention to lift her or his freeze, such as the caller's social security number or date of birth. Several commenters state that when subscribers contact certain LECs to lift their preferred carrier freezes, those LECs go further and attempt to retain customers by dissuading them from choosing another carrier as their preferred carrier

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[405] *See, e.g.,* Ameritech Comments at 20-21 (discussing development of 24 hour voice response unit).

[406] IXC Long Distance Comments at 5.

[407] Ameritech Reply Comments at 14. *See also* NYSCPB Reply Comments at 10; U S WEST Reply Comments at 25.

[408] MCI Petition at 9. *See also* Midcom Petition Comments at 3; BCI Comments at 3.

selection.[409] Indeed, SNET states that there is no reason for incumbent LECs to treat the lifting of preferred carrier freezes "as ministerial and not as an opportunity to market the services of its affiliates."[410] We disagree with SNET and believe that, depending on the circumstances, such practices likely would violate our rule, discussed above, that carriers must offer and administer preferred carrier freezes on a nondiscriminatory basis. Indeed, we are aware of states that have made similar findings that a carrier that is asked to lift a freeze should not be permitted to attempt to change the subscriber's decision to change carriers.[411] In addition, such practices could also violate the "just and reasonable" provisions of section 201(b).[412] Much as in the context of executing carriers and carrier change requests, we think it is imperative to prevent anticompetitive conduct on the part of executing carriers and carriers that administer preferred carrier freeze programs.[413] Carriers that administer freeze programs otherwise would have no knowledge at that time of a consumer's decision to change carriers, were it not for the carrier's position as a provider of switched access services. Therefore, LECs that receive requests to lift a preferred carrier freeze must act in a neutral and nondiscriminatory manner. To the extent that carriers use the opportunity with the customer to advantage themselves competitively, for example, through overt marketing, such conduct likely would be viewed as unreasonable under our rules.[414]

6. Information about Subscribers with Preferred Carrier Freezes

133. We do not require LECs administering preferred carrier freeze programs to make subscriber freeze information available to other carriers because we expect that, particularly in light of our new preferred carrier freeze solicitation requirements, more subscribers should know whether or not there is a preferred carrier freeze in place on their

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[409] *See, e.g.,* CompTel Petition Comments at 4; Sprint Comments at 34; MCI Reply Comments at 10 (indicating that LECs engage in "win back" efforts even while participating in three-way calls). *But see* Bell Atlantic Reply Comments at 11, n.21.

[410] SNET Petition Reply Comments at 7.

[411] *See, e.g.*, Illinois Commerce Commission, *MCI Telecommunications Corp. et al. v. Illinois Bell Telephone Co.*, Order, Case Nos. 96-0075 and 96-0084 (rel. Apr. 3, 1996) ("[d]uring telephone calls for the purpose of changing the customer's intraMSA PIC to another carrier, Respondent should not attempt to retain the customer's account during the process"); Michigan Public Service Commission, *Sprint Communications Company, L.P. v. Ameritech Michigan*, Case No. U-11038 (Aug. 1, 1996) (concluding that "if a customer with [a preferred carrier freeze] calls to change providers, Ameritech Michigan shall not use that contact to try to persuade the customer not to change providers").

[412] 47 U.S.C. § 201(b).

[413] *See supra* discussion on Marketing Use of Carrier Change Information.

[414] *See* 47 U.S.C. §§ 201, 208.

carrier selection.[415] Given our requirement that LECs make available a three-way calling mechanism to lift preferred carrier freezes, if a subscriber is uncertain about whether a preferred carrier freeze has been imposed, the submitting carrier may use the three-way calling mechanism to confirm the presence of a freeze. Thus, we expect that carriers will not typically need to rely on such information to determine whether a freeze is in place.[416] On the other hand, we see benefit to the consumer -- in terms of decreased confusion and inconvenience -- where carriers would be able to determine whether a freeze is in place before or during an initial contact with a consumer. As one alternative, we encourage LECs to consider whether preferred carrier freeze indicators might be a part of any operational support system that is made available to new providers of local telephone service.

7. When Subscribers Change LECs

134. Based on the record developed on this issue, we do not adopt the Commission's tentative conclusion that LECs would automatically establish existing preferred carrier freezes that were implemented with the prior LEC when a subscriber switches his or her provider of local service.[417] Rather, we conclude that when a subscriber switches LECs, he or she should request the new LEC to implement any desired preferred carrier freezes, even if the subscriber previously had placed a freeze with the original LEC. We are persuaded by the substantial number of LEC commenters asserting that it would be technically difficult or impossible to transfer information about existing preferred carrier freezes from the original LEC to the new LEC.[418] It is our understanding that these difficulties are accentuated because each LEC has different procedures for managing preferred carrier freeze mechanisms. Moreover, because our rules will allow carriers to have different means for lifting freezes, it will be important for subscribers to be informed of the new LECs' procedures before deciding whether to renew a freeze. In the absence of such a requirement, we expect that LECs will develop procedures to ensure that new subscribers are able to implement any desired preferred carrier freezes at the time of subscription, thus avoiding potential confusion for subscribers.

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[415] *See* MCI Petition at 8-9; IXC Long Distance Reply Comments at 5. We note that at least one incumbent LEC makes this information available already. BellSouth Reply Comments at 7; *cf.* Ameritech Reply Comments at 11-12.

[416] If we find that substantial impediments to the timely identification and lifting of preferred carrier freezes exists in the future, we can revisit this issue.

[417] *Further Notice and Order*, 12 FCC Rcd at 10,689. *See also* OCC Comments at 3; Worldcom Comments at 10.

[418] *See, e.g.*, Ameritech Comments at 23; Bell Atlantic Comments at 5; MCI Comments at 17. *See also* Ohio Commission Comments at 12.

8. Preferred Carrier Freezes of Local and IntraLATA Services

135. We decline the suggestion of a number of commenters that we prohibit incumbent LECs from soliciting or implementing preferred carrier freezes for local exchange or intraLATA services until competition develops in a LEC's service area.[419] In so doing, however, we recognize, as several commenters observe, that preferred carrier freezes can have a particularly adverse impact on the development of competition in markets soon to be or newly open to competition.[420] These commenters in essence argue that incumbent LECs seek to use preferred carrier freeze programs as a means to inhibit the ability or willingness of customers to switch to the services of new entrants. We share concerns about the use of preferred carrier freeze mechanisms for anticompetitive purposes. We concur with those commenters that assert that, where no or little competition exists, there is no real opportunity for slamming and the benefit to consumers from the availability of freezes is significantly reduced.[421] Aggressive preferred carrier freeze practices under such conditions appear unnecessary and raise the prospect of anticompetitive conduct.[422] We encourage parties to bring to our attention, or to the attention of the appropriate state commissions, instances where it appears that the intended effect of a carrier's freeze program is to shield that carrier's customers from any developing competition.

136. Despite our concerns about the possible anticompetitive aspects of permitting preferred carrier freezes of local exchange and intraLATA toll services in markets where there is little competition for these services, we believe that it is not necessary for the Commission to adopt a nationwide moratorium. Indeed, we remain convinced of the value of preferred carrier freezes as an anti-slamming tool. We do not wish to limit consumer access to this consumer protection device because we believe that promoting consumer confidence is central to the purposes of section 258 of the Act. As with most of the other rules we adopt today, the uniform application of the preferred carrier freeze rules to all carriers and services should heighten consumers' understanding of their rights. We note the strong support of those consumer advocates that state that the Commission should not delay the implementation of

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[419] *See, e.g.*, MCI Petition Reply at 3; Intermedia Comments at 7; LCI Comments at 1; Telco Comments at 7; Excel Reply Comments at 2-3.

[420] *See, e.g.*, NAAG Comments at 11; PaOCA Comments at 7; Sprint Comments at 34.

[421] *See, e.g.*, MCI Comments at 13-14; Ohio Commission Comments at 11-12; *cf.* USTA Reply Comments at 7. *Cf.* BellSouth Comments at 12, n.25 (stating that it does not offer preferred carrier freezes for choice of local service providers whether the provider is BellSouth or a reseller CLEC).

[422] *See, e.g.*, Ohio Commission Comments at 11-12; LCI Comments at 2-3; Intermedia Comments at 6; TRA Petition Comments at 2-4 (citing examples from MCI Petition).

preferred carrier freezes.[423] We also expect that our rules governing the solicitation and implementation of preferred carrier freezes, as adopted herein, will reduce customer confusion and thereby reduce the likelihood that LECs will be able to shield their customers from competition.

137. We make clear, however, that states may adopt moratoria on the imposition or solicitation of intrastate preferred carrier freezes if they deem such action appropriate to prevent incumbent LECs from engaging in anticompetitive conduct. We note that a number of states have imposed some form of moratorium on the implementation of preferred carrier freezes in their nascent markets for local exchange and intraLATA toll services.[424] We find that states -- based on their observation of the incidence of slamming in their regions and the development of competition in relevant markets, and their familiarity with those particular preferred carrier freeze mechanisms employed by LECs in their jurisdictions -- may conclude that the negative impact of such freezes on the development of competition in local and intraLATA toll markets may outweigh the benefit to consumers.

9. Limitation on Freeze Mechanisms for Resold Services

138. A number of commenters indicate that preferred carrier freeze mechanisms will not prevent all unauthorized carrier changes.[425] Specifically, and as described above, when a subscriber changes to a new carrier that has the same CIC as the original carrier -- such as a change from a facilities-based IXC to a reseller of that facilities-based IXC -- the execution of the change order is performed by the facilities-based IXC, not the subscriber's LEC.[426] Where such a change is made without the subscriber's authorization, it is referred to as a "soft slam." In a soft slam, the LEC does not make any changes in its system because it will continue to send interexchange calls from that subscriber to the same facilities-based IXC, using the same CIC. Since the soft-slam execution is not performed by the LEC and the LEC may not even be notified of the change, the LEC's preferred carrier freeze mechanism would not prevent such a change. We seek comment in the attached Further Notice of Proposed Rulemaking about issues concerning resellers and CICs, including alternative methods for preventing switchless resellers from circumventing a subscriber's preferred carrier freeze protection

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[423] *See, e.g.,* OCC Reply Comments at 6 ("Customers would thus not be able to protect themselves against slamming for one year under AT&T's proposal."); NYSDPS Comments at 8-9; NCL Comments at 8.

[424] *See, e.g.,* New Jersey Board of Public Utilities, *Investigation of IntraLATA Toll Competition for Telecommunications Services on a Presubscription Basis*, Docket No. TX94090388 (June 3, 1997); California Public Utilities Commission, *Alternative Regulatory Frameworks for Local Exchange Carriers*, Decision 97-04-083 (Apr. 23, 1997); Tex. Admin. Code Title 16, § 23.103 (prohibiting freezes for intraLATA toll services until subscribers receive notice of equal access).

[425] *See, e.g.*, NYSDPS at 9.; Ameritech Petition Comments at 17; U S WEST Reply Comments at 11, n.28.

[426] *See supra* discussion on Definition of "Submitting" and "Executing" Carriers.

through soft slams.[427] We encourage commenters to address these issues in detail.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

139. The framework we have established in this *Order* is aimed at eliminating slamming by attacking the problem on several fronts, including keeping profits out of the pockets of slamming carriers, imposing more rigorous verification procedures, and broadening the scope of our rules to encompass all carriers. We seek additional comment on several issues that either were not raised sufficiently in the *Further Notice and Order* or that require additional comment for resolution. Specifically, we seek comment on (1) requiring unauthorized carriers to remit to authorized carriers certain amounts in addition to the amount paid by slammed subscribers; (2) requiring resellers to obtain their own carrier identification codes (CICs) to prevent confusion between resellers and their underlying facilities-based carriers; (3) modifying the independent third party verification method to ensure that this verification method will be effective in preventing slamming; (4) clarifying the verification requirements for carrier changes made using the Internet; (5) defining the term "subscriber" to determine which person or persons should be authorized to make changes in the selection of a carrier for a particular account; (6) requiring carriers to submit to the Commission reports on the number of slamming complaints received by such carriers to alert the Commission as soon as possible about carriers that practice slamming; (7) imposing a registration requirement to ensure that only qualified entities enter the telecommunications market; (8) implementing a third party administrator for execution of preferred carrier changes and preferred carrier freezes.

A. Recovery of Additional Amounts from Unauthorized Carriers

140. As explained above, because section 258 specifically mandates that the unauthorized carrier remit to the authorized carrier all amounts paid by the consumer, we conclude that Congress intended that the authorized carrier should be entitled to retain these payments, at least in the amount that the authorized carrier would have charged the subscriber absent the unauthorized change.[428] In light of this statutory restriction, we have established in this *Order* rules that treat differently subscribers who discover an unauthorized change before they pay their bills and those subscribers who do not discover that they have been slammed until after they have paid their bills. Conversely, the authorized carrier receives payment only if the subscriber first pays the slamming carrier. The rules we have adopted above reflect our efforts to balance the interests of consumers and carriers consistent with the provisions of the statute. We seek further comment, however, concerning possible mechanisms that would relieve the tension between compensating consumers and compensating authorized carriers, while maintaining a strong deterrent effect against slamming. We specifically seek comment

[427] *See infra* discussion in Further Notice of Proposed Rulemaking, Resellers and CICs.

[428] *See supra* discussion on Subscriber Refunds or Credits.